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RECENT CENTRALIZING TENDENCIES IN THE SUPREME COURT.

IN the very valuable address of Justice Miller at Philadelphia during the constitutional celebration occurs this sentence: "While the pendulum of public opinion has swung with much force away from the extreme point of states-rights doctrine, there may be danger of its reaching an extreme point on the other side." This idea may have been suggested by a perusal of some recent opinions rendered by the Supreme Court of the United States. Five opinions, rendered during the last four terms of the court, give some indication of the motion of the pendulum so far as determined by the influence of that body.

I.

Questions relating to commerce between the states are now coming with frequency before the tribunal of last resort, and naturally the movement of the pendulum is most apparent here. The right of a state to tax interstate commerce indirectly by taxing an undivided mass of commerce, state and interstate, was for some years settled by two decisions rendered in 1872. In what is commonly called the State Freight Tax Case,[1] the court held that Pennsylvania had no right to levy a tax of a certain amount per ton on merchandise hauled from a point within the state to a point without, or from a point outside to a point within; this was interstate commerce, the tax was a regu-

[1] 15 Wallace, 232.

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lation thereof, and Congress had the exclusive right of such regulation. But in the Railway Gross Receipts Case,[1] the court held that Pennsylvania might levy a tax on the earnings of a railroad, though a part was derived from interstate commerce; the money had lost its connection with the merchandise and had become, with other moneys, the property of the company within the state. In a dissenting opinion, in which Justices Field and Hunt concurred, Justice Miller declared the doctrine which has since been made the doctrine of the court. He laid down the broad proposition

> that by no device or evasion, by no form of statutory words, can a state compel citizens of other states to pay to it a tax, contribution or toll, for the privilege of having their goods transported through that state by the ordinary channels of commerce.

In process of time the Philadelphia and Southern Mail Steamship Company resisted the collection of a tax on its gross receipts, and the issue thus raised was determined by the Supreme Court in May, 1887.[2] There was no dissenting opinion filed, but this does not indicate unanimity on the bench so much as that the justices who were disposed to dissent from the position taken by the majority felt that they had sufficiently defined their views in dissenting opinions filed earlier in the same term. Justice Bradley, in reading the opinion of the court, referred to the action of the court in 1872, and combatted its reasoning. The foundation of the decision in the Gross Receipts Case, he stated, was that the tax was laid upon a fund which had become incorporated into the general mass of the company's property. Just as imported goods, after their original packages have been broken, are taxable, so the proceeds of interstate transportation, when they lose their specific identity, are under the authority of the states. This analogy, however, seemed to the learned justice unsound. For, he argued, when the imported goods

> become mingled with the general mass of property in the state, they are not followed and singled out for taxation as imported goods, and by

[1] 15 Wallace, 284. [2] 122 U. S. 326.

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reason of their being imported. If they were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the state, they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in Welton *vs.* Missouri, 91 U. S. 275, that goods brought into a state for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the state, or because they are the products of another state. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax.

There is a great difference, he continued, between taxing a man on his property without reference to the source from which it is derived, and laying a special tax upon his receipts in a particular employment.

If such a tax [as the latter] is laid and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it.

The analogy with the taxation of imported goods was therefore declared to be fallacious, and the principle of the Railway Gross Receipts Case to be untenable.

According to this new decision, then, a state may not tax any receipts of a railway company derived from foreign or interstate commerce, even though those receipts be mingled with moneys earned from commerce wholly within the state. The people of Illinois will be interested in noting this opinion, and they will be still more interested in ascertaining whether it is to be deemed retroactive. It is an old story about the lawyer, who, being interrupted by the court with the curt remark, "That is not the law," neatly replied: "It was the law, your honor, until you decided otherwise." The state debt of Illinois has been paid off and the state government for years has been supported

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by a tax on the gross receipts of the Illinois Central railroad, very much of whose traffic is of an interstate character. If the doctrine of the Railway Gross Receipts Case was the law until their honors decided otherwise, no greater evil has come upon the state of Illinois than the necessity of finding some new source of revenue. But if the doctrine of the case of Steamship Company *vs.* Pennsylvania is to be held as having been the law in past years, then the state of Illinois owes the Illinois Central railroad all the millions that have been collected from it.

II.

Until lately the states have been allowed to regulate their internal commerce, even though commerce with other states has been thereby indirectly affected. Of course it was never pretended that states could operate directly upon interstate commerce as such; but it was the doctrine of the Supreme Court that so long as Congress did not legislate upon the subject, states might take action in regard to such interstate commerce as was mingled almost inextricably with the commerce of the state. The opinion of the court in the Wabash Railroad Case,[1] October, 1886, together with the vigorous and exhaustive protest against it signed by three members of the court, makes this matter very clear. It is not necessary for a layman to undertake to construe the earlier opinions of the court, because that was done in the Wabash case by the majority of the court with great diplomacy, and by the minority with great frankness.

The so-called Granger Cases were decided at the October term of 1876. In the case of Munn *vs.* Illinois,[2] the question was the right of the state to regulate mixed state and interstate commerce by fixing maximum charges for the use of grain elevators located within the state of Illinois. Peik *vs.* the Chicago and Northwestern Railway Company[3] turned on the question of Wisconsin's right to make certain regulations as to the classification of freight. Inasmuch as the required classifications differed from those of Illinois, and the railroad in ques-

[1] 118 U. S. 557. [2] 4 Otto, 113. [3] 4 Otto, 164.

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tion was engaged mainly in transportation between the two states, the regulations in question directly affected and obstructed interstate commerce. The Supreme Court said in the Munn case:

> The warehouses of these plaintiffs in error are situated, and their business carried on, exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.

In the Peik case, the opinion rested on the same grounds:

> Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, *etc.*, so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally these may reach beyond the state. But certainly until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without.

In the Wabash case, the question was as to the right of the state of Illinois to regulate the charges for hauling in the state of Illinois freight originating in that state, but destined for New York. The court, through five of its nine members, denied the right of the state. The opinion was read by Justice Miller. He quoted from the Munn and Peik cases the passages cited above, and admitted in a general way that the court treated those cases as involving that class of regulations of commerce which, like bridging navigable rivers, pilotage and many others, could be acted upon by the states in the absence of any legislation by Congress on the same subject. Having himself concurred in those earlier decisions, he was prepared to take his share of the responsibility for the language

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used. He believed it clear, however, from the reports, that the question involved in the present case did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. The opinion then goes on to argue that the commerce in question was interstate commerce, and could therefore be regulated only by act of Congress; and if Congress omitted to regulate it, this was to be taken as a declaration by Congress that it should not be regulated. Even while the freight was within the state of Illinois it was beyond the jurisdiction of the state, for the general reason that if Illinois could legislate regarding it, every other state that the freight passed through might do the same, and interstate commerce might be made impossible.

Chief Justice Waite, who, having written the opinions of the court in the Munn and Peik cases, ought to have been particularly well qualified to construe them, joined Justice Bradley and Justice Gray in a dissenting opinion in the Wabash case. Justice Bradley, who read the dissenting opinion, did not think that the point in the Wabash case had been so slightingly treated in the Munn and Peik cases as the majority of the court represented, and he made a quotation from the Peik opinion which had not been referred to by Justice Miller.

> These suits [said that opinion] present the single question of the power of the legislature of Wisconsin to provide by law for a maximum of charge by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the state, or taken up outside the state and brought within it, or taken up inside and carried without.

With such a statement of the question, the dissentient justices could not see how this case could be distinguished from that under consideration. The fact that in Peik's case there was a classification of freights and a limitation of charges, and in the present case a prohibition of discrimination in the charges, they considered a distinction without a difference.

> The question [the dissenting opinion said] rests solely and entirely upon the power of the state, when unrestrained by any contract or by

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any action of the legislative department of the United States. Does it follow then that because Congress has the power to regulate this matter (though it has not exercised that power), therefore the state is divested of all power of regulation? That is the question before us. We had supposed that this question was concluded by the previous decisions of this court: that all local arrangements and regulations respecting highways, turnpikes, railroads, bridges, canals, ferries, dams and wharves, within the state, their construction and repair and the charges to be made for their use, though materially affecting commerce, both internal and external, and thereby incidentally operating to a certain extent as regulations of interstate commerce, were within the power and jurisdiction of the several states. That is still our opinion. It is almost a work of supererogation to refer to the cases. They are legion.

Reference was made to Justice Field's opinion in the Escanaba case, 107 U. S. 687, which held that the power to control the bridges over the Chicago river, — their construction, form and strength, the size of their draws and the manner and times of using them, could nowhere be better vested than with the state or the authorities of the city upon whom it had devolved that duty; that if this power should be so exercised as unnecessarily to obstruct the navigation of the river, Congress might interfere and remove the obstruction; but that until Congress acted, the power of the state over bridges across its navigable streams was plenary. Justice Bradley then continued:

It is matter of common knowledge that from the beginning of the government the states have exercised almost exclusive control over roads, bridges, ferries, wharves and harbors. No one has doubted their right to do so. . . . There is a class of subjects, it is true, pertaining to interstate and foreign commerce, which require general and uniform rules for the whole country so as to obviate unjust discriminations against any part, and in respect of which, local regulations made by the states would be repugnant to the power vested in Congress, and therefore unconstitutional; but there are other subjects of local character and interest which not only admit of, but are generally best regulated by, state authority. The distinction is pointed out and enforced in the case of Cooley against the Port Wardens of Philadelphia, 12 Howard, 299. In that case it was held that the pilotage regulations of the different ports of the country belong to the latter class and are susceptible of state regulation. This case has been approved in several subsequent decisions.

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Differing in the circumstances, but not unlike in the issues involved, are the ferry cases. The Gloucester Ferry Company was engaged in the business of carrying passengers and merchandise across the Delaware, by means more safe and commodious than those in existence at the time General Washington made his historic passage. The company's property was all located at Gloucester, N. J., except during the few minutes when a boat was discharging at the wharf in Philadelphia. It was attempted, however, to tax the company in Philadelphia on the ground that it did business there. In April, 1885, the Supreme Court denied this right,[1] arguing that as the company had no property in Philadelphia, there was nothing to tax there but its commerce, pure and simple, and that this, being wholly interstate, could be touched only by Congress. A similar opinion had been rendered some fifteen years before, in the case of St. Louis *vs.* Ferry Company.[2] Here the ferry company operated between Missouri and Illinois at the city of St. Louis. Its property was all in Illinois, though in St. Louis the company paid a license to the city and a wharfage tax. The insatiable municipality then sought to tax the company on the value of its boats. The right might have been denied by the Supreme Court, perhaps, simply on the ground that the property was not within the jurisdiction of the municipality; but the court considered this case, like that of the Gloucester company, in connection with the broader question of interstate commerce.

It will be noticed that this ferry company was engaged in interstate commerce and nothing else. The court did not pass on the right of St. Louis to levy a license tax on the company and to charge it wharfage, because these questions were not raised. Both are taxes upon interstate commerce. Though the wharfage might be regarded as rental for a certain piece of property, the license tax admits of no such theory. But even though wharfage be deemed rental, the difficulties regarding it are not removed. If the wharf be private property, any charge made therefor by the state or municipality is not rent, but a tax levied upon the commerce done at that wharf. If the wharf be

[1] 114 U. S. 196. [2] 11 Wallace, 423.

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public property, the tax may be called rent, but it may also be placed so high as seriously to obstruct the commerce that seeks terminal facilities. The Supreme Court cannot stop with the decision in the Wabash Railroad Case. St. Louis's wharfage and license fees must not be tolerated; the cities of Rock Island and Davenport, or either of them, must not be permitted to regulate a street car company that runs cars from the state of Illinois to the state of Iowa; Chicago must not be permitted to obstruct lake commerce by closing its drawbridges, and New York city must be restrained from regulating foreign commerce through control of wharfage and pilotage. What time is likely to elapse before the consummation of these reforms, may be estimated from the fact that fifteen years intervened between the Railway Gross Receipts Case and that of the Philadelphia Steamship Company against Pennsylvania, only ten years between the Granger Cases and the case of the Wabash railroad, and that eight years after the court held that the state of Tennessee *could* tax a drummer from Connecticut, it held that the same state could *not* tax a drummer from Ohio.

III.

It is because he is an agent of interstate commerce that the federal judiciary extends its ægis over the commercial traveller, — the "drummer," who gives the step to the armies of commerce. The Supreme Court has descanted on his utility, and has painted in dark colors the condition of the manufacturers and wholesale merchants of the country without him. For a good many years the law was that a license tax on drummers and peddlers was valid if it made no discrimination between those of the taxing state and those coming from other states. The state of Tennessee levied a license tax on commercial travellers, without any such discrimination. A Connecticut sewing-machine company had an agent in Nashville, and on one occasion he went into Sumner county to solicit orders for the machines. Having taken out no license, he was duly arrested and fined for violation of law, and his case reached the Supreme Court.

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The opinion of the court[1] was read by Justice Swayne, who said:

A law which requires a license to be taken out by peddlers who sell articles not produced in the state, and requires no such license with respect to those who sell in the same way articles which are produced in the state, is in conflict with the power of Congress to regulate commerce with foreign nations and among the several states. . . . In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state or of the citizens of the state which enacted the law. Wherever there is, such discrimination is fatal. Other considerations may lead to the same result. In the case before us, the statute in question, as construed by the supreme court of the state, makes no such discrimination. It applies alike to sewing machines manufactured in the state and out of it. The exaction is not an unusual or unreasonable one. The state, putting all such machines upon the same footing with respect to the tax complained of, had an unquestionable right to impose the burden.

The state went on collecting this license tax, and in course of time the arrest of the drummer for a Cincinnati paper house gave rise to the case of Robbins against Shelby County Taxing District,[2] an *alias* of the city of Memphis. In the course of eight years the opinion of the court had undergone such a change that the idea that "it is a test question whether there is any discrimination" was treated with surprise and impatience, if not with contempt. Justice Bradley, who read the opinion of the court, said:

It is strongly urged as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers, those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of the State Freight Tax, 15 Wallace, 232. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.

[1] Machine Company *vs.* Gage, 100 U. S. 676.
[2] 120 U. S. 489.

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The learned justice proceeds in the following ingenious manner to show that the tax in this case was a discrimination against the merchants of states other than Tennessee:

> They can only sell their goods in Memphis by the employment of drummers and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside, and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis.

The opinion of the court concludes with this touch of humor:

> To say that the tax, if invalid as against drummers from other states, operates as a discrimination against the drummers of Tennessee, against whom it is conceded to be valid, is no argument; because the state is not bound to tax its own drummers; and if it does so whilst having no power to tax those of other states, it acts of its own free will and is itself the author of such discrimination.

Chief Justice Waite, with whom Justices Field and Gray concurred, read a dissenting opinion. In it he said:

> I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler, and yet I can hardly believe it would be contended that the provision of the same statute now in question which fixes a license fee for all peddlers in the district, would be held to be unconstitutional in its application to peddlers who came with their goods from another state and expected to go back again. . . . If citizens of other states cannot be taxed in the same way for the same business, there will be discrimination against the inhabitants of Tennessee and in favor of those of other states. . . . The constitution gives the citizens of each state all the privileges and immunities of citizens in the several states, but this certainly does not guarantee to those who are doing business in states other than their own immunities from taxation on that business to which citizens of the state where the business is carried on are subjected.

The commissioners of the District of Columbia have lately forbidden the distribution of advertising circulars from house to

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house. The relations of the district to Congress make this a somewhat peculiar case, but suppose that the city government of Philadelphia adopted a similar regulation; it would take very few changes in the opinion read by Justice Bradley in the case just considered to show that the enforcement of such an order against the advertisements of a New York merchant was an unconstitutional interference with interstate commerce. The humble handbill is as useful in its way as the magnificent drummer, and the case supposed is not one of regulation but of absolute prohibition. The reader of Justice Bradley's opinion in the Robbins case can easily imagine him describing the disadvantages the New York merchant would labor under if he were denied the right to leave the announcement of his wares under every door in Philadelphia. The Philadelphia merchant can attract attention to his goods by the displays in his store windows, but the New York merchant is ninety miles away; shall he sit down supinely and with folded hands wait for the casual Philadelphian to pass his store? Shall he trust to the mails, and attempt the interminable task of enlightening all Philadelphia as to his wares by personal correspondence? This would be as "silly and tedious" as the judge says trying to sell goods without a drummer would be. It is perfectly plain that the anti-handbill ordinance, when applied to a merchant in another state, is a regulation of interstate commerce. It puts the remote and therefore unseen and unheard-of dealer at a disadvantage with the local dealer, who can without expense stand in his own doorway and haul passers-by from the sidewalk into his place of business and compel them to look at his bargains. The ordinance was undoubtedly enacted to create this precise disadvantage, and to operate as a protection to the local dealers. If solicitation by sample be interstate commerce when the goods sampled are without the state, solicitation by advertisement is interstate commerce under like circumstances; and if a trifling regulation or a low tax on interstate commerce be unconstitutional, and "interstate commerce cannot be taxed at all," then what shall we say of an absolute prohibition of one of its branches?

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IV.

It would be hard to mention any power of a state government more essential to the well-being of the people of the state than the power to regulate corporations. A corporation is the creature of the state, with no rights or privileges but those conferred upon it by the state. Under the principle of limited liability, the vast powers for good or evil which result from the combination of persons and of capital, are balanced by no corresponding responsibility. The extent to which a large and wealthy corporation can defy the state needs only an allusion; every reader can supply the illustrations. The various commonwealths deal in very different ways with this problem of the corporation. In some states a corporation can be created only by the direct act of the legislature. Presumably in these states a charter is granted only after careful investigation, and after the legislature becomes satisfied by inquiries as to the men seeking incorporation — their characters, their purposes and their means — that the public good will be promoted thereby. But on account of distrust in the integrity of legislators, many states have by general laws made the right to incorporation practically free to all citizens. In Illinois, for example, any five men who are able to pay five dollars for a certificate can get incorporated, and can enjoy all the privileges and immunities attaching to that condition. The Supreme Court is advancing rapidly towards the position that such a self-created corporation is entitled in another state to all the privileges of a corporation there created by special act of the legislature; and the Illinois corporation would have by the constitution this additional right, that all its litigation with the citizens of the state in which it lived and did business could be transferred from the courts of that state to those of the United States.

The people of the Western states have suffered particularly from foreign corporations. A citizen who deems himself wronged by a railroad company doing business in his own, but created in another state, can not afford to sue the company, because the latter will have the case transferred to the federal

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courts. The state courts are held in every county and the citizen could afford to sue in them; but the federal courts are held at only two or three points in the state, and litigation hundreds of miles from home is very expensive. A farmer in the extreme of southern Illinois has $1000 of insurance on his house, which is damaged by fire. He says it will take the full amount to repair the house. The Minnesota or Ohio or New Hampshire insurance company says to him: Take $250 or sue; and if you sue, we can get the case removed into the federal court, and you and your lawyers and your witnesses will have to go to Springfield, and as the federal docket is crowded, you will have to wait a good while at considerable expense.

Whether or not any constitutional remedy be practicable, there is a real evil here, and this evil is just as proper a subject for the speculations of the Supreme Court as are the possible abuses that might arise if states were allowed to touch incidentally interstate commerce and foreign corporations. To remedy this evil the state of Wisconsin passed a law requiring that foreign corporations, before attempting to do business in the state, should waive their right to transfer litigation to the federal courts. This was decided by the Supreme Court in Morse *vs.* Insurance Company, 20 Wallace, 445, to be unconstitutional. Then the state enacted that no foreign corporation should do business in the state without taking out a license, and that the state officers should revoke the license of any corporation that transferred to the federal courts suits brought against it by citizens of Wisconsin. In 1876, the Supreme Court upheld the constitutionality of this law in the case of Doyle *vs.* Insurance Company, 4 Otto, 535. Justice Hunt, now dead, read the opinion of the court, and Justices Miller and Bradley, still on the bench, and Swayne, deceased, filed a dissenting opinion. The opinion of the court asserted the following principles, as stated in the syllabus:

> A state has the right to impose conditions, not in conflict with the constitution or the laws of the United States, to the transaction of business within its territory by an insurance company chartered by another state, or to exclude such company from its territory, or having given it a license, to revoke it with or without cause.

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The legislature of Wisconsin enacted that if any foreign insurance company transferred a suit brought against it from the state courts to the federal courts, the secretary of state should revoke and cancel its license to do business within the state. An injunction to restrain him from so doing because such a transfer is made, cannot be sustained. The suggestion that the intent of the legislature is to accomplish an illegal result, — to wit, the prevention of the resort to the federal courts, is not accurate. The effect of this decision is that the company must forego such resort or cease its business in the state. The latter result is here accomplished.

As the state has the right to exclude such company, the means by which she causes such exclusion, or the motives of her action, are not the subject of judicial inquiry.

About 1885 Iowa enacted a similar law affecting railroads; as to insurance companies, Illinois followed the example of Wisconsin ten years ago.[1] The Chicago and Northwestern railroad, doing business in Iowa, continued its business without taking out a license. To make a test case an engineer was arrested for violating the law, and this case, Barron *vs.* Burnside, was decided by the Supreme Court in April, 1887. The court held that the part of the law requiring a license to be taken out was invalid, because another part of the law provided for the withdrawal of the license in case the railroad company removed a suit to the federal courts. In the Wisconsin case, the court had refused to inquire into the motives actuating the legislature in the enactment of the law. "An emotion, or a mental proceeding," it was said, is not "the subject of inquiry in determining the validity of a statute." But in the Iowa case, the entire attention of the court was turned upon the emotion or mental proceeding in the members of the legislature who enacted the law. The requirement of a license was declared unconstitutional because of the motive that prompted it.[2] In reading the opinion, 121 U. S. 186, Justice Blatchford sought

[1] For analogous legislation in Indiana, in reference to foreign loan companies, see the POLITICAL SCIENCE QUARTERLY for March, 1890, p. 71.

[2] "The manner in which, in this statute, the provisions on these subjects are coupled with the application for the permit and with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the federal court." 121 U. S. 197.

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to gloss over the contradiction between it and that in Doyle *vs.* Insurance Company. Of the latter he said: "The point of the decision seems to have been that as the state had granted the license, its officers would not be restrained by injunction by a court of the United States from withdrawing it." If the syllabus above quoted does not refute this statement, the following extracts from the formal opinion may be added:

> A license to a foreign corporation to enter a state does not involve a permanent right to remain, subject to the laws and constitution of the United States. Full power and control over its territory, its citizens and its business belong to the state.
>
> If a state has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. . . .
>
> The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion which cannot be applied to the affairs of life.
>
> . . . It is said that we thus indirectly sanction what we condemn when presented directly: to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an "inexact statement." The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts, or to cease to do business in the state. It gives the company the option. This is justifiable because the complainant has no constitutional right to do business in that state; that state has authority to declare at any time that it shall not transact business there. This is the whole point in the case, and without reference to the injustice, the prejudice or the wrong that is alleged to exist, must determine the question. No right of the complainant under the laws or constitution of the United States by its exclusion from the state is infringed; and this is what the state now accomplishes. There is nothing therefore that will justify the interference of this court.

All this is overruled by the same court in Barron *vs.* Burnside. According to the opinion here, the foreign corporation is in Iowa by right and not by grace. When it is proposed to put it out, it can go into court and show that the reason why its ejection is sought is an improper one. A corporation may

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possibly be reached by the state that created it, but it now has an iron clutch upon every state that did not create it. It is the foreign corporation, like the foreign drummer, that is privileged.

Two months after this decision, the state of Massachusetts had a visit from a foreign corporation. The state had for some reason that seemed good to it decreed a few years before that thereafter no gas company should be organized with more than $500,000 capital. When some gentlemen thought they saw a chance to make a great deal of money by buying out all the Boston gas companies and obtaining a monopoly of the lighting of the city, they went over to New York and got themselves incorporated, with a capital of $3,000,000. Then they returned to Boston and began to gather in the gas companies, as all the gas companies of Chicago have since been gathered in by one great corporation. It was probably to guard against this very thing that the limitation upon capital was enacted. But the Massachusetts legislature is powerless to protect the city in which it sits, because New York can grant an incorporation that is perfectly good in Boston. The New York gas company in Boston has all the privileges that a Massachusetts company would have, and two besides: it can take its litigation into the federal courts, and it cannot be deprived of its charter by the legislature of Massachusetts. The New York legislature might be able to annul its charter; but the company would not be troubling any citizens of New York, and the statesmen at Albany could not be expected to exert themselves in behalf of the citizens of Boston. Congress might have power to interfere, but Congress cannot get time to give the necessary legislation to the city of Washington; what would it be likely to do for Boston?

The Supreme Court can take but one step farther in the direction in which it has travelled from Doyle *vs.* Insurance Company to Barron *vs.* Burnside: it can affirm that the rights of corporations are inalienable, and that a corporation created by one state, or self-created under the laws of one state, has the same rights in every other state that the citizen of one state has in every other state.

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V.

In the case of Gus. Leisy & Co. *vs.* A. J. Hardin, commonly called the Original Package Case, decided April 28, 1890, the Supreme Court has changed the law (1) as to the power of the several states to regulate the liquor traffic, (2) as to the distinction between merchandise brought from a sister state and that brought from a foreign country, and (3) as to the point at which imported merchandise passes from national to state regulation; and in each instance, the power of the central government is enlarged, and that of the state is curtailed.

The right to regulate the liquor traffic in all forms and degrees had been uniformly held by the Supreme Court of the United States to be within those police powers which belong to the several states, even though their exercise has an indirect effect upon interstate or even foreign commerce. A long list of citations in support of this will be found in the dissenting opinion of Justice Gray — Justices Harlan and Brewer concurring — in the Original Package Case. In Pierce *vs.* New Hampshire, License Cases, 5 Howard, 564, the court affirms the right of New Hampshire to prevent the sale of liquor brought from Massachusetts and offered for sale by the importer in the original package, — the precise point decided the other way in the late case. In Mugler *vs.* Kansas, 123 U. S. 623, the court affirmed the right of a state to prohibit the manufacture of intoxicating liquors even when it destroyed the value of buildings erected long previous to the prohibitory enactment. In Kidd *vs.* Pearson, 128 U. S. 1, the court upheld a law of Iowa forbidding the manufacture of alcoholic liquors for export and sale outside of the state. The net result of all this is that a state may enact a prohibitory law; it may virtually confiscate property by forbidding the use of a brewery for brewing, or a distillery for distilling; it may even regulate interstate commerce by forbidding the export of alcoholic liquors: but it must not forbid the import of liquors, or their sale in "original packages."

How completely such a decision as that in the Original Package Case would destroy all state regulation of the liquor

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traffic, probably the most important subject of its police powers, was foreseen by the justices who decided the License Cases.[1] The Supreme Court of 1847 sought for the power to enable the people of the several states to regulate their own affairs in their own way; the Supreme Court of 1890 sought for excuses to break down this power. One of these excuses was found in the opinion in Bowman *vs.* Chicago and Northwestern Railway, 125 U. S. 465, and another in the venerable case of Brown *vs.* Maryland, 12 Wheaton, 419. As to the former, Justice Gray said in his dissenting opinion:

> While Mr. Justice Field in his separate opinion (125 U. S. p. 507) intimated, and three dissenting justices (pp. 514, 515) feared, that the decision was in effect inconsistent with the decision in the License Cases, Mr. Justice Matthews, who delivered the judgment of the majority of the court, not only cautiously avoided committing the court to any such conclusion, but took great pains to mark the essential difference between the two decisions. On the one hand, after making a careful analysis of the opinions in the License Cases, he said: "From this analysis it is apparent that the question presented in this case was not decided in the License Cases. The point in judgment in them was strictly confined to the right of the states to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the states was not questioned."

In Brown *vs.* Maryland the Supreme Court decided that a state law imposing a license tax upon importers was invalid, as a regulation of foreign commerce; and Chief Justice Marshall said: "It may be proper to add that we suppose the principles

[1] Justice Catron said (5 Howard, 608): "To hold that the state license law was void as respects spirits coming in from other states as articles of commerce would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities the retail trade would require." Justice Woodbury said (p. 625): "If . . . anything imported from another state, foreign or domestic, could be sold outright in the package in which it was imported, not subject to any license or internal regulation of a state, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring state. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with or regulated, the retail business can be carried on in any small quantity and by the most irresponsible and unsuitable persons, with perfect impunity." *Cf.* also the remarks of Justice Grier, pp. 631, 632.

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laid down in this case apply equally to importations from a sister state." The court in the Original Package Case lays great emphasis on Marshall's supposition, and is unable to see any reason for making a distinction between importations from a foreign country and from a sister state. Yet it is only five years since the court made this distinction as explicitly as possible. In Brown *vs.* Houston, 114 U. S. 622, Justice Bradley, reading the opinion of the court, affirmed the right of Louisiana to tax coal brought from Pennsylvania and offered for sale in New Orleans by the importer in the original packages — flatboats — in which it was brought from Pennsylvania. He said:

> It was decided by this court in the case of Woodruff *vs.* Parham, 8 Wall. 123, that the term "imports," as used in that clause of the constitution which declared that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one state into another, but only to articles imported from foreign countries into the United States. In that case the city of Mobile had by ordinance passed in pursuance of its charter, authorized the collection of a tax on . . . sales at auction. . . . Woodruff and others were auctioneers, and were taxed under this ordinance for sales at auction made by them, including the sales of goods, the products of other states than Alabama, received by them as consignees and agents, and sold in the original and unbroken packages; but as the ordinance made no discrimination between sales at auction of goods produced in Alabama, and goods produced in other states, the court held that the tax was not unconstitutional. A contrary result must have been reached under the ruling in Brown *vs.* Maryland, 12 Wheaton, 419, if the constitutional prohibition referred to had been held to include imports from other states as well as imports from foreign countries; for, at the time the tax was laid, the condition of the goods, in reference to their introduction into the state, was precisely the same in one case as in the other. This court, however, after an elaborate examination of the question, held that the terms "imports" and "exports" in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one state to another.

The court explains, as one reason for allowing Louisiana to tax the coal in question, that otherwise the coal might entirely escape taxation. And so we reach the conclusion that the

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Supreme Court will refuse federal protection to the coal that seeks to escape taxation, but will draw the awful circle of our national authority around the bottle containing one glass of Illinois beer whose existence is threatened by the state of Iowa.

This case of Brown *vs.* Houston also gives us some information as to what the Supreme Court thought on May 4, 1885, about the point at which an import passed under the authority of state law. Justice Bradley said:

> It [the tax] was imposed after the coal had arrived at its destination, and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year, or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year (1880), as all other property in the city of New Orleans was taxed. Under the law it could not be taxed again until the following year. It was subject to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana.[1] It was treated in exactly the same manner as such goods were treated.

It appears in the cross-light of these two opinions that coal became "a part of the general mass of property in the state" as soon as it "had arrived at its destination and been put up for sale." But beer remains an import under the especial protection of the United States government, and not until it has been sold by the importer and the "original package" has been broken can the state touch it directly or indirectly. After the beer has been consumed, however, the state may arrest the consumer for disturbing the peace.

The reason why the constitution gave Congress the power to regulate interstate commerce seems to receive little attention from the Supreme Court. In Bowman *vs.* Railway the reason was alluded to, but the reasoning was rather misused than used. The power to regulate interstate commerce was conferred on Congress to prevent any state from surrounding itself with a

[1] It was Justice Bradley who explained in Robbins *vs.* Shelby County Taxing District, that a tax on products of another state was a regulation of interstate commerce, and invalid even if it created no discrimination. *Cf.* p. 398, *supra.*

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protective tariff. The essential thing provided for was, as set forth in Brown *vs.* Houston, that one state should not discriminate in favor of its own and against the citizens of another state. Until recent years this is all the Supreme Court has insisted upon. But the court is now declaring that a state must not even indirectly touch interstate commerce, even though it touches its own commerce in exactly the same way. An Ohio drummer in Tennessee is exempt from the tax the Tennessee drummer must pay. The Illinois brewer may flood Iowa with beer though every Iowa brewery be closed by the legislature of the state. Justice Matthews objected to the Iowa statute involved in Bowman *vs.* Railway because in analogy with it Iowa might establish a protective tariff in favor of her own citizens and against those of other states. But this is an entire misconception of the analogy. If the state of Iowa prohibits the sale of a certain article believed to be dangerous or deleterious, whether made in Iowa or in Illinois, no discrimination in favor of Iowa and against Illinois is effected, and nothing remotely resembling a state protective tariff is established.

Had the Supreme Court sufficiently attended to the purpose underlying the constitutional grant of power to Congress over interstate commerce, these contradictory opinions would have been avoided, and this national destruction of state prohibitory laws, — this invasion by the federal government of a domain which for over a century has been regarded as within the power of the states, would have been wholly unnecessary.

It was a justice of the supreme court of Wisconsin who remarked humorously of himself and his colleagues that they were always right because they always had the last guess. Supreme courts not only have the last guess, but they have the opportunity of guessing more than once at the same conundrum.

FRED. PERRY POWERS.

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STATE CONTROL OF CORPORATIONS AND INDUSTRY IN MASSACHUSETTS.

I.

IN our new era of industrialism the people are compelled to look to the state for help. Competition is tending to take a subordinate place, and it can no longer be regarded as the means by which the evils in our producing and distributing systems are to be suppressed. We cannot expect, as did the economist of the past, that the selfish interests of men will so operate against one another as to force competitors in manufacture, trade and transportation to give the public the largest service, the lowest prices, the greatest privileges and the fullest justice. Business strife becomes so drastic in its effects, at times, that it operates against the welfare of all competitors and goes beyond the most exacting requirements of the public good. Combination, instead of competition, is the conspicuous fact in our industrialism to-day. Stimulated partly by the necessity that all or nearly all competitors should survive, rather than that all should perish, and partly by regard for the great and rapidly returning profit which may be extorted by a monopoly, the effort of our producers, our traders and our common carriers is toward the trust, the pool or some other kind of combination. By these it is hoped that competition may be put aside and that prices may be made at least to cover the cost of service or production, and if possible to stand at the maximum which consumers can be forced to pay. That all combinations are maintained for the sake of undue profit, is not admitted; that such is the purpose of some of them, official investigations prove. The development of combination in place of competition has been accompanied by the discovery that monopoly, if properly managed, is often economically advantageous. Under proper management, a railroad, a telegraph or telephone system or

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works for the public supply of gas and water should be a monopoly. Indeed, almost the entire distribution of the products of industry might be effected more economically by monopoly than by competition. A village would be better off, economically, with one grocery sufficient for the public service than it is with the dozen or score that it has. One paper manufacturing company with a large product may be better than two or three companies each with a small product. While such facts have been forcing themselves into recognition, the state has been creating corporations with a free hand and has indeed, by general laws, placed the organization of a corporation within the power of any group of citizens, without further reference to the legislature. In this new order of things great evils have sprung up, due to abuse of their privileges and excess of their powers by corporations and by all classes of monopolies. These evils are too well known to be recited here.

Upon the facts thus concisely stated, rests the necessity for some sort of state action toward corporations and industry. A wide range of propositions is open to the theorist. At one extreme is the anarchy which would abolish the state. Next to this is the still existing reliance upon competition ultimately to do away with the evils arising from the abuses of combination; that is to say, we are to stand inertly by and see wealth distributed by extortion, content with reflecting that the procedure may possibly exhaust itself in time. Then there is Herbert Spencer's let-alone theory, which allows the state just enough action to enforce contracts and to maintain the equal liberty of its citizens, with a very narrow conception of liberty. Under this theory the monopoly of a railroad or gas company could not be defended, nor could a trade combination be subjected to regulation. We next pass by one long step to a "school" which would radically remove the source of these evils by substituting public for private ownership. The municipality is to own and operate its gas works, and the state its railroads and telegraphs. If it is necessary that this step should be taken, the ultimate destination is nothing short of full social industrialism. The reasoning which justifies the public acquisition of any of the

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natural monopolies must lead eventually to the acquisition of all of them. Nor can it stop here. The trade combination is yet in its infancy and there is reason to believe that, with the strengthening of the spirit of co-operative effort which must go on as our civilization advances, this combination must approach much nearer to a permanent monopoly than it now is. We already have artificial monopolies with much of the power of natural monopoly while they last. They will in the end require substantially the same treatment. If trade combinations are repeatedly broken, they are also repeatedly renewed, and in the present state of popular ignorance regarding their effects, their renewal is the more fearful fact. The general public, it is believed, suffers more from some trade combinations than it does from the private management of railroads, telegraphs and the gas business. If the telegraphs should be owned by the state, so should the coal mines, the paper mills, the sugar and petroleum refineries.

But it may not be necessary to go into social industrialism at all. We should be slow and cautious about surrendering our liberty to the state. The burden of proof certainly rests upon him who would persuade us to do this. We would not have the state forbid all persons to go to Saratoga in order that a gambling house there might be closed for want of gamblers. That would be a great outrage upon liberty. The industrialism of the Peruvians before the Spanish conquest could not produce a millionaire outside of the reigning family, and wealth, such as it was, was distributed among the masses of the people with an evenness that no civilized nation has ever attained; but this result was not worth the great sacrifice of liberty that it cost. In proportion as the suppression of liberty advances, the plane upon which individual effort may act is limited and lowered. The Peruvian, whose industrial state is worthy of more attention than has generally been given to it in connection with this subject, had so little scope for private initiative that his social evolution could proceed only on the plane that had been prescribed for him, and there not freely. The type of his social and industrial institutions was crystallized. The ques-

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tion that confronts us is whether we want to crystallize our industrialism at the present stage of its evolution, so that its type shall not be further changeable. Ought we not to wait until the age of co-operative production and distribution shall demonstrate what it can do?

II.

The experience of Massachusetts in this matter points out a field for state action which promises to render further steps toward social industrialism unnecessary. This state is regulating corporations and industry on a large scale and with much success. The results indicate that for the most effective suppression of the evils arising from the improper management of corporations and monopolies, with the least encroachment upon the liberty of the individual, the best means is to be found in the extension and perfection of the system here employed. I refer to various boards of commissioners which the state has created, with large discretionary powers, for the purpose of securing from corporations compliance with legal requirements. There are railroad commissioners, an insurance commissioner, savings-bank commissioners, gas and electric-light commissioners, an inspector of gas meters and illuminating gas, a commissioner of foreign[1] mortgage corporations, a board of arbitration and conciliation, factory and public building inspectors and a commissioner of corporations. Each of these boards acts more or less at discretion and, with the exception of the board of arbitration, has back of it a group of laws to be enforced against corporations. It is the purpose in the pages that follow to review the administration of these state agencies.

Massachusetts is now recognizing and maintaining some of the natural monopolies. The bold stand was taken by the legislature of 1882 that no railroad corporation organized under the general law should be allowed to construct a line until the railroad commissioners should have certified "that public

[1] Foreign, as used in the Massachusetts statutes, means foreign to Massachusetts and not necessarily foreign to the United States.

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convenience and necessity require the construction of a railroad as proposed." Earlier than that, the monopoly of the gas business was possible, under the law which permitted a gas company to dig up the streets of a town or city only with the permission of the selectmen or of the mayor and aldermen. A law of 1887 regarding gas companies was more explicit and forbade such a company to open the streets for laying pipes in any town or city where another gas company was doing business, except with the consent of the selectmen or of the mayor and aldermen, from whom, however, an appeal might be taken to the gas and electric-light commissioners. A similar law was applied to electric-lighting companies in the same year. The state is thus committed to the principle that natural monopolies should remain such. With the agencies at its service, Massachusetts is no longer afraid of these monopolies.

As to corporations, the first specialized agency of the state to look after their affairs was the board of bank commissioners, established in 1851, but now supplanted by the savings-bank commissioners. The board, as now established, must visit every savings and state bank each year, or oftener if expedient, and "shall have free access to vaults, books and papers, and shall thoroughly inspect and examine all the affairs of each of said corporations, and make such inquiries as may be necessary to ascertain its condition and ability to fulfil all its engagements and whether it has complied with the provisions of the law." The laws whose enforcement is thus enjoined provide for a division of the risks of investments, name the classes of securities that may be taken and relate to the treasurer's bond and other precautions to preserve the solvency of the banks. The commissioners are to notify the attorney-general to bring suit for injunction or other order of the court in case of violation of law. A bank becomes insolvent now and then through embezzlement or mismanagement; for the frailties of human nature will manifest themselves under any political or industrial system; but, in that event, the liquidation is so managed that depositors usually get all or nearly all of their deposits. The savings-bank commissioners make annual return of their actions and of the

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financial condition of every savings bank, institution for savings, loan and trust company and co-operative bank.

A board of insurance commissioners was established in 1855, but there is now only one commissioner. As often as once in three years he is required personally or by his deputy or chief clerk to visit each domestic insurance company and thoroughly inspect its affairs, especially as to its financial condition and as to whether it has complied with the laws. He may also make an examination whenever he deems it prudent or upon the request of five policy-holders, creditors or other persons pecuniarily interested in a company's affairs; and he is authorized to investigate the affairs of foreign companies doing business in the state. No new insurance company or fraternal beneficiary organization can do business until it has satisfied the commissioner that it has complied with the law and is financially able to assume risks. When he finds that any domestic insurance company is insolvent or has exceeded its powers or has failed to comply with any provision of the law, or that its condition is such as to render its further proceedings hazardous to the public or to its policy-holders, it is his duty to apply to a justice of the supreme court for an injunction restraining the company from further proceeding with its business. For any of these reasons, moreover, the commissioner may forbid a foreign insurance company to do business in the state. No insurance of any kind can be written except under the Insurance Act, which provides many safeguards for the interests of the policy-holders against the fraud and insolvency of the companies. The famous non-forfeiture law, enacted in 1861 and made more definite in 1880, annihilated one of the greatest abuses of the business. If a company's capital is impaired, the commissioner forbids it to issue more policies until its funds equal its liabilities. He reports annually what he has done and makes public the financial condition of every domestic company and "such other information and comments in relation to insurance and the public interests therein as he deems fit to communicate."

The Massachusetts insurance commissioners have waged an unremitting warfare against the frauds of insurance companies,

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and the result is that to-day this state is unrivalled in the financial soundness of its companies and in the justice and fairness with which the policy-holder is treated. Whether his insurance is life, accident, fire, marine, fraternal or assessment, he may feel secure in all his interests. Assessment insurance companies began business a few years ago without financial responsibility, and they were likely to collapse at any moment without redress for policy-holders. One company in Massachusetts divided large dividends with the excesses of assessments, and another dissolved without the assent of its benefit members. The insurance commissioner was instrumental in having a law enacted putting this kind of insurance under his surveillance, surrounded by the proper financial safeguards. Referring to his examination of a foreign insurance company, Commissioner Tarbox said in his report for 1886:

> In the examination it appeared that it has effected illegal re-insurances and made false statements to the department, and the conduct of its affairs had not been in accordance with sound business methods. Similar delinquencies were disclosed in the affairs of [another company]. The penalties for these offences were enforced against these companies upon proceedings instituted by the attorney-general and the sum of $2,000 recovered to the use of the Commonwealth.

Commissioner Merrill, in 1887, reported that

> an attempt was made to galvanize into life the defunct fraudulent ——— Benefit Association; a new name was selected, but the old managers who fostered the project could not so much as keep fraud and falsehood out of the preliminary papers submitted to the department, and the scheme came to grief without securing authority to prey upon the public.

A foreign fidelity insurance company was fined in 1886 for making a false statement, and there were several successful prosecutions of foreign companies in 1887, in which year, also, the public was warned against a certain fraudulent Indiana life insurance company. If more were needed, many references to reports might be given to show how thorough an oversight is exercised by the insurance commissioner over the business

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of the companies, and how effective it is in securing financial responsibility and in preventing fraud.

The successful mission of the board of railroad commissioners, established in 1869, has been one of the great and important facts of government. This board had for examples the achievements of the savings-bank and insurance commissioners, but it had a vastly greater undertaking than theirs. The general and to some extent the special character of its duties are outlined by the law:

> The commissioners shall keep themselves informed as to the condition of railroads and railways and the manner in which they are operated with reference to the security and accommodation of the public, and as to the compliance of the several corporations with their charters and the laws of the Commonwealth.
>
> The board, whenever it deems that repairs are necessary upon any railroad, or that an addition to its rolling stock or an addition to or change of its stations or station houses or a change in its rates of fares for transporting freight or passengers or in the mode of operating its road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public, shall in writing inform the corporation of the improvements and changes which it considers to be proper.

In case of a violation of law by a railroad corporation, the attorney-general is to be notified to bring suit. Upon complaint of the selectmen, the mayor and aldermen or twenty legal voters of any town or city, the railroad commissioners are to examine the condition and operation of any railroad partly located in said town or city and to recommend any action they deem necessary. The annual report of the commissioners is to include

> such statements, facts and explanations as will disclose the actual working of the system of railroad transportation in its bearing upon the business and prosperity of the Commonwealth, and such suggestions as to its general railroad policy or part thereof, or the condition, affairs or conduct of any railroad corporation, as may seem to it appropriate.

Only the more important of the laws whose enforcement is imposed upon the commissioners can be mentioned here:

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No railroad, or branch or extension of a railroad, shall be opened for public use until the board, after an examination, certifies that all the laws relating to its construction have been complied with and that it appears to be in a safe condition for operation.

No railroad company shall, in its charges for the transportation of freight or in doing its freight business, make or give any undue or unreasonable preference or advantage to or in favor of any person, firm or corporation, nor subject any person, firm or corporation to any undue or unreasonable prejudice or disadvantage.

Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants and of any merchandise and other property upon its railroad, and for the use of its depot and other buildings and grounds; and at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of exchange.

The capital stock of a railroad company can be increased only with the consent of the railroad commissioners or by special legislative act, and there is a strict law against stock watering. There are provisions regarding brakes and brakemen, tools for use in case of accident, non-explosive fluid for lighting cars and mufflers to accompany vacuum brakes and safety valves on engines. Employees must be examined for color-blindness, checks must be given for baggage and receipts for freight, and "reasonable accommodations for the convenience and safety of passengers" must be supplied. The fares, tolls, charges and regulations of a railroad company are at all times subject to revision and alteration by the General Court or by such officers or persons as it may appoint for the purpose. No highway or railroad is allowed to cross a railroad at grade except with the consent of the commissioners and under regulations prescribed by them. Railroad companies must forward merchandise as directed and not by a different route. Milk cans must be carried as advantageously for the small shipper as for the large one, — a rule designed to prevent the practice which prevailed at one time of forcing farmers to ship through a middleman who hired whole cars. Connecting railroad companies must draw each other's passengers and freights. The

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famous short-haul law, enacted in 1874, has been fully enforced without entailing evil, though it may not be adapted to the through traffic of a continent. The railroad commissioners are by law made arbitrators in the cases of some questions arising between railroad companies in their relations with one another. They investigate and publicly report the causes of every accident deserving attention, and advise a company which is at fault to change the practice or condition that led to the accident. Explosives can be transported only under the regulations of the commissioners. Street railway companies are under their jurisdiction, and are also under the regulative power of local authorities in regard to speed of cars, use of tracks and removal of ice and snow. The commissioners have full power to revise and regulate the fares of street railways, but not the passenger and freight rates of steam railroads, except charges for transporting milk; beyond this their power in regard to charges is only advisory.

The variety and minute detail of the commissioners' jurisdiction may be well seen from the following results of their activity: companies have been compelled to grant facilities for carrying on the express business to petitioners to whom such facilities had previously been denied, and to accord terms reasonable and equal to those given to competitors; to give better accommodation in the checking of baggage; to give lower rates and higher speed in the transportation of fish from Cape Cod to Boston; to abate the public nuisance of whistling at certain crossings; to render dangerous crossings safe; to change the location of a station in accordance with the wishes of the public and against the wishes of the company, and to modify the construction of stations for greater convenience; to run workingmen's trains; to observe legal precautions at the crossing of tracks; and to build stations and stop trains at summer resorts. Furthermore, such acts as the following appear in the record of the commission's work: a project of street railway officers to build a road on borrowed capital and to get the road into their own hands without putting in any of their own money, was reported to the attorney general, who prevented its success; a

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sea-beach railroad company, which had discontinued all trains in the winter, was compelled to run one train daily; a milk train was stopped every day at an obscure station; an express train was stopped at a station previously passed by; a discontinued train was restored; a new accommodation train to Boston was run; coal freights were reduced 15 per cent; the operation of a railroad was stopped because its construction was illegal; the speed of an express train was slackened when running by a station where another train was taking on passengers; a through car from a certain town to Boston was added to a train; the discontinuance of a station was prevented, as was also the execution of a threat to stop the issue of half-rate tickets to school children; air brakes were substituted for hand brakes; discrimination in freight rates and violation of the short-haul law were stopped; and defects in track and road-bed, as reported by a civil engineer employed as inspector, were remedied.

The administration of the Railroad Act has accustomed the companies to obedience to a law or to a decision given by the commissioners, without the further intervention of the board. For instance, a law of 1885 gave the commissioners, upon petition of municipal authorities, power to regulate or forbid the use of level crossings for the purpose of making up or disconnecting freight trains. At once either these obstructions to travel wholly ceased or railroad managers began improvements which remedied the evil. If there is one place in the state where a highway crossing is unreasonably used by freight trains to public annoyance, it is because there is not local public spirit enough to produce a complaint. A company rarely refuses to comply with a recommendation of the commissioners. In case of such a refusal the legislature is likely to interpose and by special law to compel obedience. One instance of this kind was the refusal of a company to reduce freight rates, and another a refusal to provide better access to a station. The decisions of the commissioners are by no means invariably in favor of complainants and petitions are in numerous cases denied. Indeed, the board is the best protection that the railroad companies have against hasty and unwise action by the legislature.

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The public interests under the general law of incorporation are protected by the commissioner of corporations, whose office was established in 1870. The organization of new corporations must by law follow a certain public procedure with safeguards against fraud and financial irresponsibility, and the incorporation is not complete until the commissioner of corporations is satisfied that the law has been complied with. No corporation organized under general or special law can begin the transaction of business until the whole amount of its capital stock has been paid in, in cash or its equivalent, and a sworn certificate of the fact filed with the Secretary of the Commonwealth; and every increase of stock is equally well protected against watering.

The gas business was placed under the supervision of commissioners in 1885. In 1861 the office of inspector of gas meters and illuminating gas was established, and his duty was and still is to inspect, prove and ascertain the accuracy of all gas meters and to see that the purity and illuminating power of all gas used for lighting reach the statutory standard. The gas of every company is to be inspected twice a year and once more for every 6,000,000 feet of gas sold. No meters must be used that do not bear the seal of the inspector. The gas and electric-light commissioners have this officer at their service. To these commissioners is assigned "the general supervision of all corporations engaged in the manufacture and sale of gas for lighting or for fuel" and of all electric-lighting companies, and they are required to "make all necessary examinations and inquiries to keep themselves informed as to the compliance of the several corporations with the provisions of the law"; in case of non-compliance, the commissioners notify the attorney-general. Upon the complaint of the mayor of a city or of the selectmen of a town in which a gas or electric-lighting company is situated, or of twenty customers of such company, the commissioners are to give a public hearing to the petitioners and the company; after such hearing, they may order any reduction they deem just and proper in the price of gas or electric lights, or any improvement in the quality thereof, and they must pass such

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orders and take such action as are necessary thereto. These commissioners make annual reports of their proceedings, including information about the price of gas and its reduction or increase and many statistics. Water gas may be manufactured and sold with their permission. In the prosecution of their duty, the commissioners have procured the fining of a company for selling impure gas, have lowered the price of a company's gas and have reported a company for issuing a stock dividend. The local authorities of every municipality also have power to regulate gas and electric-lighting companies so far as the acts of such corporations "may in any manner affect the health, safety, convenience or property of the inhabitants of such place."

The express, the telegraph and the telephone business are not yet under the supervision of commissioners, but selectmen and mayors and aldermen may establish reasonable regulations in reference to the erection and maintenance of all telegraph and telephone lines within their respective municipalities; and express, telegraph and telephone companies are forbidden by law to discriminate among customers in their charges and accommodations.

The board of arbitration and conciliation, established in 1886, has power to bind by its decision for a limited length of time, not exceeding six months, employers and their employees who unite in submitting their differences to it for arbitration. Upon the application of either party or upon its own motion, the board may publicly investigate all controversies between employers and employees, and may attempt to conciliate the parties. This board is yet too young to have made any great record for itself, but its mission so far has been generally successful and its recommendations have been substantially complied with in cases submitted to it by both parties. In the performance of its duties it has given advice in favor of the restoration of men to work who were discharged on account of being union men; against the reduction of the wages of coal heavers; against the discharge of bricklayers because they were not union men; in favor of shortening the hours of work of some of the paper-mill operatives. It has established labor price lists

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in the boot, shoe and granite-cutting industries, and has prescribed rules of work and decided questions regarding the speed of machinery and the character of the stock used in manufacture. An annual report of its doings is required of the board; that for 1887 says:

> The board has been frequently consulted, as well by employers as by workingmen and workingwomen, in regard to differences which did not call for an extended inquiry and were quietly adjusted without publicity and without any formal hearing or adjudication by the board.

Yet another agency for regulating corporations is found in the inspectors of factories and public buildings, a body created in 1878 and consisting of twenty-three members drawn from the district police. The duties of the inspectors are increased almost every year and, among other things, now include the enforcement of the factory laws and the laws regarding the employment of women and minors. No woman or minor under 18 years of age may be employed for more than ten hours a day in any manufacturing or mechanical establishment, and time for meals must be allowed them as specified. Seats must be provided for females, who must be allowed to sit down when their work permits. No child under 13 years of age may be employed in any factory, workshop or mercantile establishment; a child between 13 and 14 years of age may be so employed only upon the permissive certificate of the local school committee that he is 13 years of age and has attended school for twenty weeks during the preceding year. Children under 14 years of age must not be allowed to clean machinery when it is in motion. No building designed to be used above the second story in whole or in part as a factory, workshop or mercantile or other such establishment may be built until its plan has been seen and approved by an inspector, who will require fire escapes, ample facilities for egress and certain precautions against fire. These latter requirements apply also to all such buildings erected before the enactment of the law. The statute book contains a wide range of provisions for the health and safety of factory employees. The inspectors are to see that these laws

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are observed and, upon the request of the municipal authorities, they must inspect any building used for industrial purposes.

The character and workings of the law may be seen from the following orders actually given by inspectors: Safety clutch to be provided for elevator and elevator openings to be guarded; railings at stairways to be securely fastened; means for extinguishing fires, new hoisting cable and additional egress to be provided; certificates of children employed to be obtained and kept on file; guards for belts, pulleys, machinery, shafts and fly wheel of engine; doors to be kept unlocked during working hours; fire escape to be repaired; better access to fire escape; seats to be provided for women; doors to swing outwardly; and so on. By secret complaint to the inspector of his district a workingman may secure the benefit of these laws without inviting the antagonism of his employer. In 1886, 1,083 factories and manufacturing or mercantile establishments and 282 public buildings and tenements were inspected and 488 orders were issued, which were generally complied with.

Finally, in 1889 a commissioner of foreign mortgage corporations was created, with powers and duties similar to those of the savings-bank commissioners.

III.

Of the success of the regulative state agencies which we have been considering, their own reports contain fair statements. From the railroad commissioners we have such paragraphs as the following:

> Grievances, when brought to the attention of railroad managers, have been so promptly redressed that any publication of the fact that they had existed would be an act of injustice. Matters which would once have been the subject of long continued newspaper discussion, followed by protracted and heated debate at the state house, have been quietly arranged as soon as the parties have been brought face to face. Questions which promised costly litigation have been settled by conference, or even by an exchange of notes.[1]

> No law in the state is more thoroughly enforced than [the short-haul law]. Indeed, it would be more correct to say that, instead of being

[1] Report for 1882.

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enforced at all, it is universally acquiesced in and obeyed. It is true that in 1882 it was shown that a railroad company in this state was acting in violation of this law. But upon receiving the opinion of this board that it was so offending, the corporation desisted from the practice and lowered its rates to conform to the statute requirements. [This law] has remedied a great evil and a great injustice; it has helped to save small industries and small places from being crushed out of existence; it has checked the tendency to consolidation which would build up one place or a few places at the cost of local enterprise.[1]

It might with confidence be claimed that there is to-day no portion of the industrial machinery of Massachusetts which, upon the whole, is conducted under a stronger sense of responsibility to the public or with so great freedom from abuses in the conduct of its business or with so anxious a desire to give reasonable satisfaction, as the railroad system of the state. In all these respects the improvement in tone which has taken place within the last few years is most noticeable and the result is apparent, even though as yet not generally realized. There has in consequence been a rapid decrease of complaints against the corporations and a no less rapid subsidence of that restless feeling of hostility which was so marked a feature in the discussions of a few years back.[2]

From the insurance commissioner we have the following paragraphs, taken from his reports for 1883, 1885 and 1887 respectively:

While elsewhere serious scandals have disgraced the business management and impaired confidence in the [life insurance companies] and numerous unworthy organizations have abused and betrayed the trust reposed in them, no company organized by the authority and subject to the laws of Massachusetts has defaulted in any of its obligations.

Since Massachusetts inaugurated its bureau of insurance thirty years ago, a great improvement has been wrought in the condition of our insurance interests, in the accomplishment whereof the bureau has borne an influential part. It has prompted wholesome laws and methods and the honorable enterprises of legitimate insurance. What it has helped to establish it is still needed to conserve and advance.

There is at the present time a general disposition to cordially comply with legal provisions in the transactions of business within the Commonwealth.

Insurance Commissioner Tarbox, in his report for 1885, quotes a distinguished underwriter as saying:

[1] Report for 1884. [2] Report for 1878.

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The fact is that for many years these [insurance] departments have stood between the companies and unwise legislators. The writer has not forgotten that the country was full of worthless companies before the departments became general, and if the latter could be abolished, the former would be as numerous as the rascals are who would like to make money by such institutions.

The board of arbitration, in its report for 1887, uses the following language:

Experience has demonstrated the fact that, if an untenable position has been assumed for the time being, it can in no way be abandoned with so little disturbance of self-respect as by conforming to the recommendations of an impartial board, acting in the name of the state. . . . In all the cases regularly submitted by both parties, the recommendations of the board have been accepted and acted upon without material variation.

The savings-bank commissioners reported in 1885: "The system of savings banks in this state has proved itself as nearly safe as any financial system within the range of monetary experience." The factory and public building inspectors reported in 1886 an improved observance of the child-labor law and the elevator law and that accidents had diminished; they reported that they had little or no trouble in enforcing the laws.

The ascertainment and publication of facts have been the means by which Massachusetts has solved the problem of regulating corporations and monopolies. The accounts of steam and street railroads, gas and electric-lighting companies, savings and co-operative banks and foreign mortgage corporations must be kept in the manner prescribed by the various commissioners, and the accounts of all these corporations and of all kinds of insurance companies must be open to the examination of the commissioners, who are to perform this duty within certain limits of time and who are empowered to summon witnesses, including the officers of the corporations under examination. An annual report to some specified public officer must be made by every business corporation in the state; this must be sworn to, and in the case of each of those just mentioned must contain many facts of detail. This reveals to the public eye the true

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financial condition of all business corporations and the profits made by those specified. Upon complaint of certain interested persons, the financial condition of any railroad company, savings bank or foreign mortgage corporation must be examined by the proper commissioners, and the latter have access to the lists of stockholders. Literary, benevolent, charitable and scientific institutions have made annual returns of their property, income and expenditures since 1882. Water companies and public water commissioners must make triennial reports about their business, capitalization, charges and property, but not about their profits. Massachusetts corporations engaged in manufacturing and mechanical industries, mining, quarrying, *etc.*, make annual returns to state officers, and most of them have done so since 1865. The law now calls for a sworn statement of

> the amount of capital stock as it then stands fixed by said corporation, the amount then paid up, the name of each shareholder and the number of shares standing in his name, and the assets and liabilities of said corporation in such form and with such detail as the commissioner of corporations shall require or approve.

The details required include the classes of assets and liabilities but do not disclose profits. The facts contained in the reports of all corporations are freely open to the public and all of them are printed for general distribution. The following paragraphs are quoted from the reports of the railroad commissioners for 1875 and 1878 respectively:

> The last vestige of the old idea that the accounts of railroad corporations are matters of private concernment only and as such can best be managed in secret, must be gotten rid of. To bring about this result, a bill was prepared, a year ago, and submitted by this board to the joint legislative committee on railways. It was meant to be radical in its character, having been prepared in the full light of the many and notorious scandals of the last ten years, and with the financial revelations which followed the crisis of 1873 still fresh in mind. It subjected the books of the railroad corporations to a constant and regular public supervision, with a view to securing accuracy and uniformity in the methods of keeping them.

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The management of [railroad] lines cannot in the future continue to be a mere hotbed of abuses. That they should be managed in the full view of the public seems, therefore, a necessary condition of their continued private ownership. In Massachusetts, at least, the proposed change has now actually been effected. The books, papers and accounts of the railroad corporations are as open to public scrutiny as those of the state or city governments; and yet not a single one of the evils so frantically predicted has ensued. On the contrary, the system works perfectly well.

But the services of these state agencies do not end here. They are also special and expert advisers to the legislature upon questions within the scope of their respective duties. Some of the best legislation that was ever put into a statute book is mainly the work of these Massachusetts boards. The Railroad Act was prepared by the railroad commissioners, the Savings-Bank Act by the savings-bank commissioners and the Insurance Act by the insurance commissioner, at the special request of the legislature. No legislative body, by any amount of committee work, can frame a reasonable code of business regulation containing many details. Insurance Commissioner Tarbox, in his report for 1884, tells us into what confusion the insurance law had fallen:

The insurance law needs comprehensive revision. It has all the vices of patchwork legislation unskilfully done by careless craftsmen. Parts of it are antiquated and obsolete and serve only to encumber and confuse. Some of its provisions are hopelessly conflicting and irreconcilable, while others are so obscure in terms and relations that only a legal expert can interpret their sense.

In his report for 1885 the commissioner continues:

Our average lawmaker cannot, or will not, qualify himself sufficiently by investigation and study of the particular matter to act with instructed judgment on subjects of a special character like insurance, and unless some impartial source of information, such as an insurance department ought to be, is available, his intelligence is liable to betrayal by vulgar prejudice or designing art into inconsiderate action.

These remarks are true of many other subjects than insurance, and the Massachusetts legislature every year shows its

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dependence upon its special advisers. To the railroad commissioners have been referred questions of proposed legislation regarding safety switches, color-blindness, freight charges on coal brought into one of the counties, limitation of the number of passengers in street cars, grade crossings, the whistling nuisance, women and children in smoking cars, signals, automatic couplers, the charges of a bridge company, the heating and lighting of cars, the fencing of railroads, protection of brakemen and trackmen, change of location of a railroad in a city, and many other matters. The bureau of statistics of labor has been called upon to report concerning employers' liability for injuries received by employees in their work, co-operative distribution, drunkenness, industrial conciliation and arbitration, convict labor, *etc.* The board of education has reported regarding industrial drawing, a half-mill fund for the support of public schools, evening schools, the best method of supervision, and so on. The board of health has made reports on oleomargarine, the sale and use of opium, the pollution of the sources of water supply, a general system of sewerage for the relief of a certain valley, *etc.* Reports have come from the board of lunacy and charity regarding proposed institutions for the care and reformation of drunkards; from the insurance commissioner on assessment insurance; from the savings-bank commissioners on the investments of savings banks; from the commissioners of prisons on methods of inflicting the death penalty; from the supervisors of statistics on the uniformity of public records. Besides making written reports to the legislature, the various state boards and agencies have repeatedly testified before legislative committees as to matters within their experience.

The general result is that the various state agencies of Massachusetts have become an effective power in a current of legislation which is producing laws that are most suitable to true legislative ends, most consistent with each other and most fairly conducive to the rights and welfare of the whole people. These agencies are powerful champions of aggrieved citizens before the legislature.

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IV.

Massachusetts could not have achieved the marked success that it has in the regulation of corporations and industry if the people had not been quick to resent offence and sensitive to public opinion. Probably the democratic government that the towns have always enjoyed is largely responsible for this. Some rigid laws announcing general principles were first necessary; but the chief portion of the effective work has been done by the commissions, depending upon full investigation and publicity of facts. It is interesting to read what some of the commissioners say regarding this kind of government. The three following paragraphs are, respectively in order, from the reports of the railroad commissioners for the years 1873, 1875 and 1878:

When the board was originally organized, great doubts were entertained whether such a method of procedure would prove effective or, indeed, of any real value. A larger experience, however, rather tends to show that, in the peculiar existing condition of the relations between the community and the corporations, this merely recommendatory power is, perhaps, best of all adapted to accomplishing many results. Theoretically, a mere power to hear, suggest and recommend amounts to nothing; practically, it may be made to accomplish a great deal, and what it does accomplish it accomplishes in the best way and with the least degree of antagonism. To exercise an arbitrary power is a very easy and short way of disposing of difficulties; but such a course inevitably leads to bitter controversies and much hard feeling. Discussion, argument and suggestion can, perhaps, in the end be made to effect as much with far less friction. Certainly the present commissioners have no disposition to ask for any increase of power.

The commissioners cannot too frequently or too forcibly remind both the legislature and the public that their chief power rests in the public feeling which they may at any time represent. Railroad corporations, as a rule, care but little for abstract principles, nor do they alter their methods of procedure in response to every suggestion, even from official quarters; they are, on the other hand, very sensitive to public opinion and they invariably yield to it when they feel that it is concentrated and persistent. To facilitate its concentration and to impart consistency to it must always remain a very important and perhaps most useful function of this board.

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The board maintained that every desired result or needed reform could be secured by simply developing in the public mind the idea of corporate responsibility and supplying the necessary machinery to act directly upon it. To bring this about, it was necessary to force the corporate proceedings into the full light of publicity and to compel those responsible for railroad management, whenever an abuse was alleged, to submit to investigation and to try to show that the abuse did not exist. Failing to do this, their only alternative was to discontinue its practice, or to persist in it in open defiance of public opinion.

The insurance commissioner has an equally intelligent understanding of the sources of the success of his department. The first quoted paragraph that follows is from his report for 1886, the others from that for 1885 :

> The plea that the corporations, if left to themselves, will faithfully, perform their trusts and do full justice to their policy-holders, and that therefore there is no need for legal protection to either, is not sustained by reason or facts.
>
> The tendency, I fear, is toward a too free resort to the sword of legislation for the redress of faults in commercial intercourse. These are often more justly reformed by the process of the natural laws of trade and the force of correct public opinion than by the compulsion and arbitrary treatment of peremptory statutes. . . . Insurance departments, if faithful to their trusts, subservient neither to unwarranted popular prejudices nor to the ambitious self-interests of the companies, may do much to enlighten popular opinion upon [the principles and methods of insurance and the conditions of its successful operation] and to maintain just relations between the companies and public, to the great advantage of both.

The experience of Massachusetts demonstrates that it has found the true field of state action in regard to corporations and industry. Not that perfection has yet been attained within the whole field; but it is apparent that, with age and extension, the policy that has now become well developed is capable of finishing the work that yet lies before it. Indeed, more has been done than remains to be done, and every further step will be looked upon as a continuance of a well settled policy that cannot now be called in question, after all the successes that it has had. When, five years ago, the entire business of the

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manufacture and sale of gas and of electric lights was placed under the control of commissioners and of the strict and radical laws which stand back of them, the proceeding was accepted by the public as a matter of course and by the companies without obstruction. It may not be a rash prophecy that the time will come when the publicity of accounts now required of the railroads, showing even their profits, will be required of every corporation existing by authority of Massachusetts. Already, railroads, gas, insurance and electric-lighting companies, and savings and co-operative banks have to report the items of their receipts and expenses, as well as of their assets and liabilities; the extension of this rule to all corporations existing for profit is all that is necessary to reduce them to the full control of the people, by whose permission alone they exist.

There are good reasons, therefore, why Massachusetts has no sympathy with the proposition that municipalities shall own their own gas works. The problem has already been solved by the suppression of that individualism only that is harmful to others. The great stock of equal liberty remains substantially unviolated. The monopoly of the gas business is defended and regulated, and there is no reasonable complaint against a gas company, from either the general public or the consumer, which is not promptly remedied without expense to the complainant. The railroad business, moreover, no longer worries Massachusetts. One may travel or receive freight over every railroad in the state and have less reason to complain against the companies than he may have in a month or a week against his grocer. The anxiety that remains is only that the system of commissions may not soon enough be extended to all corporations and especially to trade combinations. These combinations, we have reason to believe, may be fearlessly tolerated when they are subjected to legal limitation and are placed under the oversight of a board of commissioners, with power to enforce the laws, to investigate their doings, and to make all their contracts as public as the doings and contracts of railroad and gas companies.

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The work of Massachusetts in this direction is in no sense a palliative, as the socialist is fond of calling every remedial attack on the existing system. A palliative counteracts certain effects without removing the cause; but Massachusetts destroys at the outset the cause of the monopoly evil. This avoids at one extreme the tendency toward anarchism, and at the other every taint of social industrialism. There is no general surrender of the liberty of the citizen to the state, except so far as it follows from the state's maintenance of some of the natural monopolies; and this more than pays for the slight sacrifice. The difference between state supervision by administrative officers and nationalization is not vast when we think of the people in their relationship to the corporations; but the difference is radical and all important when we think of the people in their relationship to the state. No one who has lived under these institutions of Massachusetts and understands their nature and administration need at all sympathize with Professor James's plea for municipal ownership of gas works, or with the incipient socialism of Professor Ely and his school. The people of Massachusetts have cause to regard these plans as unnecessary, and as unwarrantable restrictions of the citizens' liberty by the state. It is not merely a question of whether the state can operate a branch of industry with more economy than private individuals. If this is all that there is to the question, it is distribution, instead of transportation and the natural monopolies of production, that first needs attention, and the state should sell milk, in order that three or four milk peddlers might be stopped from peddling milk on one city block. If this were nothing but a question of mathematical economics, there would be no room for a protest against the delivery of the people into the power of an industrial despot or a bureaucratic cuttlefish. We are not obliged to choose between social industrialism and unrestrained private monopoly.

The oversight of corporations and natural monopolies by Massachusetts brings with it a good not generally thought of. Though a person is allowed to have justice from a court within

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its criminal jurisdiction without cost to himself, he is denied free justice within its civil jurisdiction. Civil justice is not obtainable from the courts by the rich and the poor with equal freedom; the court guarantees justice only to those who can pay for it. Since the boards of commissioners have come into being, they have, by their action and by the menace of their existence, dispensed a vast amount of justice without expense to those who have received it. As the railroad commissioners, in their report for 1884, said of the residents of Massachusetts and the work of the board:

> The humblest of her people may find, without delay and without cost, redress against the most powerful class of her corporations. . . . .
>
> In such matters an appeal to the board takes the place of a long-continued suit against a powerful corporation, to be followed through all the courts and to be contested on technical points by skilled counsel, resulting in great expense and perhaps in a nominal fine. The cheap and speedy remedy of a hearing by the board is better for both parties and relieves the complainants from the sense of wrong which is often more weighty than the wrong itself.

In this work of the state of Massachusetts, an aggrieved person need pay no burdensome fees; he is subjected to no long delays; he cannot lose his case by an error in practice, or by the turning of a lawyer's technicality.

The general conclusion warranted, then, is that, by extending the sphere of the state in the way of regulation, inspection and publication of facts, and in maintaining at least the natural monopolies, the evils arising from corporations and from the private ownership of the means of production and transportation may be prevented by discretionary administrative officers. The problem of these evils, to which many writers are giving extreme or visionary answers, has been substantially solved by the political experience of Massachusetts. In response to the alarm felt at the private ownership of railroads or gas works, and the fault found with their uneconomic competition, the people of Massachusetts have made legal monopolies of gas and railroad companies and, so far as a state's jurisdiction goes, have disposed of all reasonable public concern about their manage-

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ment. The great fear of the natural monopolies is entirely dispelled in this state, though the monopoly feature is protected. It only remains for the state to pursue what is now its well established policy, to include within it the small remnant of the natural monopolies not now fully included, and to extend this policy to all corporations and trade combinations. When that shall be done, the trust, as is now the case with the railroad and the gas company, may have a very harmless appearance. Those who advocate the remedy of state ownership may be compared to the man who protects himself against a boy with a snowball by killing the boy. The social industrialism is no more necessary than the homicide is. There are two parties who advance reasons for state ownership. The average untrained thinker aims only to do away with the excesses of private and monopolistic power; the economist is thinking mainly of the waste of capital, the inflation of capital stock and the irresponsible private management. Massachusetts returns answer to both of these parties. The economist has not yet proved that a public monopoly can be operated more economically than a private monopoly that is protected and regulated by the state. Professor Hadley, in the POLITICAL SCIENCE QUARTERLY for December, 1888, goes farther and says that there is no economic advantage as against private monopolies that are not so protected and regulated.

A people among whom public opinion shall have the force of law without legislative enactment or judicial authority has been dreamed of as possessing an ideal state; and yet Massachusetts has entered into the domain of this kind of government and is enjoying an appreciable amount of it. Socialism and anarchy may here find their compromise. When we examine the character of the present government of this state, we find that the principles of the common law are substantially all formulated, and that the chief business of the courts is the application of these principles to cases and the holding of negligent and reluctant persons to their legal duties and responsibilities by menacing them with the courts' power. As to the statute law, the criminal portion is about complete, as it ought to be after

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creating nearly 1,000 crimes; the civil portion is continuing to receive such additions as the evolution of conditions demands, and, no doubt, more than are needed, while various departments of laws are undergoing revision and codification to be placed in the charge of administrative officers. It is desired to diminish the activity of the legislature, not that the power of the state may be limited, as a learned writer infers, but that it may be diverted from legislation into administration.

The other states of the Union are following the lead of Massachusetts in this course, though most of them must lag far behind. It is not easy for a corporation-ridden state, like Pennsylvania, to enter this field of action, nor for such a state as South Carolina, half of whose population ten years of age and over is illiterate. But, after all, the trend of the civilization of the United States is toward the conditions which make possible the kind of government that is our theme. It is required that a large body of the people of the state shall be intelligent and educated; that they shall be devoted to reading and discussion; that associated efforts shall be habitual and frequent; that population shall be considerably dense; and that resentment against wrong and whatever limits the common welfare shall be quick and energetic. Hence it is that in Massachusetts wealthy corporations are the servants not the masters of the people, and that industry is moulded to fit the popular welfare. Competing gas works cannot be set up nor can a railroad be paralleled. The total property and assets of the New York and New England Railroad Company amount to nearly $40,000,000; but for a grievance against that company that falls within the jurisdiction of the railroad commissioners, there is no resident of Massachusetts too humble to get redress, if he can command four cents with which to pay for the paper and postage of a letter.

GEORGE K. HOLMES.

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THE TAXATION OF CORPORATIONS. II.

IN the preceding essay[1] we traced the history and actual condition of the corporation tax in the United States. The whole subject was shown to be involved in almost inextricable confusion, amid which, however, some thirteen different bases for levying the tax might be distinguished. These, it will be remembered, were the value of the property, cost of the property, capital stock at par value, capital stock at market value, capital stock plus bonded debt, capital stock plus total debt, loans, business, gross earnings, dividends, capital stock according to dividends, net earnings and franchise. In the attempt to analyze these various methods it may be well to begin with the last, on account of its obscurity as well as of its importance.

IV. *The Franchise Tax.*

We are confronted at the outset by the question: what is a franchise? The matter has been brought squarely before the public by the provisions of the California constitution of 1879, and by recent tax laws of states which, like New Jersey, Illinois, North Carolina and Tennessee, prescribe that franchises of corporations shall be separately assessed.[2] Before we can discuss the franchise tax, we must attempt to ascertain in what a franchise actually consists.

Blackstone defines a franchise as "a royal privilege or branch of the King's prerogative subsisting in the hands of a subject." But this does not teach us much. It is too vague for our purposes. The Supreme Court of the United States has given this definition:

[1] POLITICAL SCIENCE QUARTERLY, V, 269 (June, 1890).

[2] In addition to these laws, the courts have held franchises to be taxable in Porter *vs.* R. R. Co., 76 Ill. 561; West River Bridge Co. *vs.* Dix, 6 Howard, 529; Veazie Bank *vs.* Fenno, 8 Wallace, 547. *Cf.* 37 N.Y. 367.

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A franchise is a right, privilege or power of public concern which ought not to be exercised by private individuals at their mere will and pleasure, but which should be reserved for public control and administration, either by the government directly or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security.[1]

This again is somewhat too narrow, since it emphasizes unduly the element of public control and public interest. These are indeed very desirable adjuncts, but they scarcely seem to be indispensable parts of the conception. I should suggest as a tentative preliminary definition, that a franchise in the wider sense is a "right conferred by government of conducting an occupation either in a particular way or accompanied with particular privileges." The motive may be either public welfare or, as has frequently happened, public revenue. This can be clearly seen by tracing the historical development of the franchise.

One of the chief sources of royal income in mediæval Europe consisted in the so-called "fines for licenses, concessions and franchises." These were simply payments for all kinds of special privileges granted to individuals or associations. The object of the payment might be to secure the general favor of the crown, to retain or to quit office, to obtain the right of exporting commodities, to conduct some business in a particular way, to obtain special jurisdictional privileges, to possess the right of *firma burgi*, and so on.[2] A most common instance can be found in the trading privileges of the guilds, granted chiefly for the sake of the accruing emoluments. Similar to these mediæval concessions are the modern licenses, especially in our Southern commonwealths. The licenses or privileges are conferred on individuals and corporations alike, and the reason in most cases is of a purely fiscal nature. What are called franchise taxes elsewhere are known simply as privilege or occupation taxes in the South. A franchise, therefore, of an individual

[1] California *vs.* Southern Pacific R. R. Co., 127 U.S. 40.

[2] A characteristic example of a fine or franchise hard to classify is this: The wife of Hugo de Neville paid the king two hundred hens eo quod possit jacere una nocte cum domino suo (who happened to be in prison). Rotuli Finium 6; quoted in Madox, History of the Exchequer, I, 471.

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or a corporation is simply a privilege. It is something over and above the value of the property, and is in a measure analogous to the "good will" of a firm. It is the indefinite something which gives vitality to the corporation and which makes its business worth having.

Franchises, indeed, vary widely in value. In some cases there is practically no difference between the business of a corporation and that of an individual, except the limited liability of the former. Such is the case in most manufacturing corporations. But in other classes of cases the corporate franchise carries with it important privileges, such as the right of eminent domain or expropriation, which are not usually conferred upon simple individuals. This difference in the value of the franchise is recognized by the laws of several commonwealths which, as we know, impose on transportation companies a separate tax in addition to the general corporate franchise tax. But the point to be noticed is that these privileges are not necessarily restricted to corporations. An unincorporated company or association may possess this particular privilege by law, and yet its privilege is not a franchise in the sense in which the jurists use the term. If, then, we attach this meaning to a franchise, the term cannot be confined to corporations. But if we use franchise in the sense of a privilege of juristic personality and limited liability only, the conception of corporate franchise becomes unduly restricted. In whatever way we look at it, a franchise cannot be more closely defined at this stage than simply as a privilege of conducting business in a particular way. But the nature of the franchise is everywhere the same. The closest analysis can disclose variations only in accidents, not in essence. A franchise always remains a franchise, however much it may vary in value.

A more difficult question arises when an attempt is made to measure the franchise of a corporation. We have seen that there are not less than thirteen separate methods of taxing corporations and that each of these methods, with one exception, is declared to involve a franchise tax. There are yet other methods of measuring franchise, such as the value of the capi-

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tal stock less the value of the property, the value of the stock less the value of the tangible property, the value of the stock less the value of the realty, the value of the stock and bonds less each or all of these items, *etc.*, *etc.* In other words there is a total lack of uniformity. Each commonwealth measures the franchise of its corporations in its own way. And it frequently happens that the same commonwealth measures the franchises of different corporations in different ways. There is an utter absence of any common standard of measurement. Capital stock, stock minus property, stock minus realty, bonded debt, business, gross earnings, dividends, profits, *etc.*, are each declared to be the value of the franchise. The result is hopeless confusion. It would be useless to examine the methods of all the states. A single example — that of New Jersey — will suffice.

The state board of assessors of New Jersey have published since 1884 several bulky volumes in which they discuss the details of corporate assessment. In the case of railroads they have adopted the following plan.[1] The market value of the stock is added to the market value of the debt. From this aggregate the total value of the tangible corporate property is deducted. The remainder is declared to be the "adventitious value of the entire road, its privileges included." The board then takes sixty per cent of this value and declares the result to be the value of the franchise. To this franchise value the board then adds the value of the real and tangible property, known as the "abstract value" of the road. The result is what is termed the entire value of the railway for purposes of taxation. But this is not all. For if the value of the tangible property exceeds the value of the stock and debt, then the board declares the franchise to be twenty per cent of the gross earnings. It will be readily perceived that this measurement of a franchise, which may give a result less than nothing, is rather awkward. And the courts of New Jersey have indeed overturned this portion of the assessors' standard by pronouncing the estimate

[1] Report of the State Board of Assessors of New Jersey, 1884, p. 26; 1885, p. 11; 1886, p. 28; 1888, p. 6.

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based on gross earnings unconstitutional.[1] But the main element in the method of valuation was upheld on the easy-going principle that no substantial injustice was done. It is this absence of "substantial injustice" to which is due the chaotic condition of franchise taxation in this country to-day.

In Illinois and California the method of taxing franchises is similar to that of New Jersey. In Illinois the board of equalization adds the cash value of the stock to that of the debt (excluding current debt), and declares the result to be the fair cash value of the capital stock including the franchise. From this the board deducts the equalized value of all the tangible property. The remainder is declared to be the value of the capital stock and franchise subject to taxation. This method was upheld by the Supreme Court of the United States as being "probably as fair as any other"![2] In California the value of the franchise is determined by subtracting from the actual value of the capital stock the value of all the items of property.[3] In the other states the determination of franchise is generally fixed by statute, but the variety of methods is infinite.

The meaning of "franchise tax" is thus something utterly indefinite. What is called a franchise tax in one state may be absolutely unlike the franchise tax in the adjoining state. The only course open for us, therefore, is to discuss the principles underlying corporate taxation, whether the tax be called technically a franchise tax or not. But before proceeding to this there still remain a few points for examination.

What is the real significance of the franchise tax? Why is it desirable that such a hard and fast line should be drawn between the property tax and the franchise tax? What is the meaning of the distinction?

The answer is very plain. In the first place, according to

[1] Case of Railroad Tax Law, N.J. Court of Errors and Appeals. Decided May 29, 1886. The case may be found in full in the third annual report of the state board of assessors, 1886, pp. 79–173.

[2] State Railroad Tax Cases, 2 Otto, 575.

[3] Approved in Spring Valley Water Works *vs.* Schottler, 62 Cal. 69, 118; Burke *vs.* Badlam, 57 Cal. 594; San José County *vs.* Jannary, 57 Cal. 614.

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the constitutions of several of the states the taxes on property must be uniform. If, however, the corporation tax is held to be a franchise tax, then there is no necessity of such uniformity between the tax on individuals and that on corporations. Secondly, according to the principles of our property tax, deductions are allowed for certain classes of exempt or extra-territorial property. If the tax is a franchise tax, such exemptions cannot be claimed. Finally, if the tax is a franchise tax, many of the objections to double taxation would be removed, as we shall see in the succeeding essay. Every commonwealth imposing a franchise tax could, for instance, assess the entire capital of a corporation, although only a very small portion might be located or employed within the state. We can hence readily understand the persistence with which the corporations seek to uphold the distinction and to have the imposition declared not a franchise but a property tax.

The question has arisen almost exclusively in connection with the taxation of capital stock or of deposits. In the case of deposits of savings banks the decisions are almost uniform that the tax is one on the franchise and not on the property.[1] Among the few commonwealths that tax such deposits, Connecticut, Maine, Maryland and Massachusetts accept this view. There is no necessary relation between the amount of the deposits and the extent of the property. The tax is therefore valid even if the deposits are invested in United States securities. Only one commonwealth, New Hampshire, has held out against the general tendency and pronounced the tax on deposits to be a property tax.[2] In the case of capital stock the matter is more complicated and the decisions are more divergent. That capital stock is in one sense property will of course be denied by no one. But the question whether the tax on capital stock is tantamount to a tax on general property is a different one. In

[1] Maryland *vs.* Central Savings Bank, 72 Md. 92; Coite *vs.* Society for Savings, 32 Conn. 173, affirmed in 6 Wall. 594; Provident Institution *vs.* Massachusetts, 8 Wall. 611. See also Commonwealth *vs.* Savings Bank, 123 Mass. 493; Jones *vs.* Savings Bank, 66 Me. 242.

[2] Bartlett *vs.* Carter, 59 N.H. 105.

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several commonwealths it has been held that capital stock practically represents the property, and that the two are interchangeable terms to all intents and purposes.[1] But as regards simply the tax on capital stock in general, other commonwealths have decided, and the federal courts have affirmed the decision, that it is not a tax on the property. Thus it has been held that the Delaware railroad tax of one quarter of one per cent on the actual cash value of the capital stock is not a tax on the property or on the shares of individuals, but a tax on the corporation, measured by a certain percentage on the value of its shares.[2] In like manner the Massachusetts taxes on the whole value of the corporate shares and on the capital stock in excess of the value of the real estate and machinery have been pronounced taxes on the franchise and not on the property.[3] On the other hand the Connecticut courts have held that the tax on capital stock plus indebtedness is not a tax on franchise but on property.[4]

In the case of capital stock as measured by dividends, it is remarkable that the courts of Pennsylvania and New York have arrived at diametrically opposite conclusions. In Pennsylvania a long series of cases has consistently maintained the doctrine that the tax is one on property.[5] The court has endeavored to lay down this rule:

> The test whether the tax in any given case is a franchise as distinguished from a property tax, would seem to be that a tax according to a valuation is a tax on property, whereas a tax imposed according to nominal value or measured by some standard of mere calculation — as contrasted with valuation — fixed by the law itself may be a franchise tax.[6]

[1] Jones *vs.* Davis, 3 Ohio, 474; Burke *vs.* Badlam, 57 Cal. 594; New Orleans *vs.* Canal Co., 29 La. A. R. 851; Whitney *vs.* Madison, 23 Ind. 331; County Commissioners *vs.* National Bank, 48 Md. 117.

[2] The Delaware Railroad Tax Case, 18 Wall. 206.

[3] Hamilton Co. *vs.* Massachusetts, 6 Wall. 632; Commonwealth *vs.* Hamilton Manufacturing Co., 94 Mass. 298; Manufacturers' Insurance Co. *vs.* Loud, 99 Mass. 146; Portland Bank *vs.* Apthorp, 12 Mass. 252, decided in 1815, and the basis of all subsequent decisions.

[4] Nichols *vs.* Railroad Co., 42 Conn. 103.

[5] Fox's Appeal, 112 Pa. 359; Commonwealth *vs.* Standard Oil Co., 101 Pa. 119; Phœnix Iron Co. *vs.* Commonwealth, 59 Pa. 104; Catawissa Appeal, 78 Pa. 59.

[6] 101 Pa. 127.

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This test, however, seems to be of very dubious applicability. The New York courts, on the other hand, have held the tax on capital stock to be a franchise and not a property tax.[1] The case was carried in last instance to the federal court. Of course the fact that the statutes of Massachusetts and New York expressly declare the tax to be a franchise tax, is of no weight; for it can justly be contended that no importance should attach to mere nomenclature. But the United States Supreme Court had already shown the tendency of its thought in the Massachusetts and Delaware decisions just cited. Moreover, in a subsequent case, the court expressly said, although indeed *obiter*, that the New York tax was "a franchise tax in the nature of an income tax."[2] Finally, in a very recent case, the tax has been definitely pronounced a franchise and not a property tax. The court uses the following language:[3]

> The tax is not upon the capital stock nor upon any bonds of the United States composing a part of that stock. . . . Reference is made to its capital stock and dividends only for the purpose of determining the amount of the tax to be exacted each year.

While we may agree with this conclusion, serious exception must be taken to some of the grounds of the decision. The court says:

> By the term "corporate franchise" . . . as here used, we understand is meant . . . the right or privilege given by the state to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise, which, when incorporated, the company may exercise.

That this is incorrect is clear from two facts. In the first place, New York already has a tax (at the rate of one-eighth of one per cent upon the amount of capital stock) which is paid by every corporation for the privilege of being a corporation. This tax is known as the state tax "on privilege of organization." A

[1] People *vs.* Home Insurance Co., 92 N. Y. 328.

[2] Or, as it is said in another place, "a tax upon its franchise based upon its income." Mercantile Bank *vs.* New York, 121 U. S. 158, 160.

[3] Home Insurance Co. *vs.* State of New York, 10 Supreme Court Reporter, 593.

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similar tax exists, as we have seen in the preceding essay,[1] in eight other states. I designated it the "tax on corporation charters" for the express purpose of avoiding the confusion between this and the corporation taxes properly so-called. And I called attention to the confusion due to the action of Connecticut, which calls this tax a "tax on corporate franchise," although in reality it is like the organization tax and not like the franchise tax in other commonwealths. We saw further that several states besides New York had an organization tax *in addition to* the franchise tax; from which it clearly results that the organization tax is paid for the privilege of being a corporation, and that the franchise tax is paid for the privilege which the corporation may exercise after it has obtained corporate rights. There would be no sense in levying two entirely distinct taxes for the same purpose. But secondly, the New York law states that the tax shall be paid by every "corporation, joint stock company or association" as a tax upon its "corporate franchise or business." Now manifestly the tax cannot be a tax on the privilege of being a corporation; for associations and joint stock companies do not possess this privilege. So far as they are concerned, the tax must certainly be a tax on conducting the business. But if the tax on the unincorporated companies be a tax on the business, how can it be said that the identical tax on the incorporated companies is a tax on the privilege of incorporation? The corporation must also conduct its business, just like the unincorporated company. To exempt the corporation from a tax on conducting its business, while assessing the unincorporated associations, would be rank injustice. It must be admitted, then, that the only way to reconcile the simultaneous and identical taxation of corporations and of other associations is to regard the tax as paid in each case for the privilege of conducting the business. Since the taxes are the same, the privileges are evidently considered the same. For additional privileges an additional incorporation tax is paid by the corporations only.

[1] POLITICAL SCIENCE QUARTERLY, V, 305 (June, 1890).

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All these considerations, however, are of little importance; for the decision can be defended on grounds totally neglected by the court. It may be granted, and in fact it is difficult to dispute the contention, that the tax is in one sense a tax on capital stock. Nevertheless it does not follow that the tax is a property and not a franchise tax. For from the economic point of view capital stock is not necessarily identical with the property of a corporation. In the first place there is the question of the market or par value of the stock. Some of the commonwealths, as we know, tax corporations on the amount, *i.e.* the par value, of the capital stock. Yet manifestly, where the market value of the stock may be double or half the par value, it cannot be maintained that the latter is identical with or an index to the value of the property. In no sense can capital stock at its par value be declared equivalent to the whole property. But even if we take the market value of the stock, we are not in a much better position. For many of our corporations, especially railroads, are created on the proceeds of the bonds. In such cases, although the property may be very great, the profits are devoted mainly to meeting the interest on the bonded debt. There may be no dividends, and the value of the stock therefore may be very slight. Yet the property which produces these profits may be enormous. Evidently the capital stock and the whole property are not identical. But we may go still farther. Even in the case of corporations which have no bonded debt, if the property does not pay good dividends, the capital stock even at its market value is no index of the property. A model-dwellings company may have property worth a million dollars; yet if it is so managed as to pay no dividends, the stock will sell in the market for a very small sum. The value of this depreciated stock is evidently not the same as that of the company's real property. They are not interchangeable terms. Thus from whatever point of view we regard it, capital stock economically speaking is not identical with the corporate property. A tax on capital stock is not a tax on the whole property.

In reality, the entire treatment of a franchise tax is based largely on a legal fiction. The conception is legal, not eco-

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nomic. It was devised by our legislatures and extended by our courts simply to evade the evil results of our general property tax.[1] Except in so far as corporations may be righteously made to pay a lump sum for the charter, there is no reason why they should be put on a different footing from joint stock companies or other associations. The ability of an association to pay, that is, its earning power, is not changed a whit by the simple fact of incorporation. The privilege of limited liability, however important it may be to the individual stockholders and however great the amount that may be demanded for the privilege as a condition precedent to organization, does not alter the taxable capacity of the association after it has once become a corporation. If the corporate franchise itself constituted the justification of a tax, how would it then be possible to tax unincorporated companies in the same way? And yet to exempt the latter would clearly constitute a glaring inequality.

There remain finally the questions as to what franchises are taxable and to what extent. As to the latter, it may be asserted that the taxation of corporate franchises has no limitation except the discretion of the taxing power.[2] The single qualification to this is the principle that no commonwealth can impose a franchise tax that may in any way, either directly or indirectly, interfere with or hamper interstate commerce.[3] As to the franchises that are taxable, it is a principle of the American polity that no state can impose a franchise tax on corporations chartered by the United States.[4] Even national banks cannot be subjected to license or privilege taxes.[5] Further than this

[1] This is apparent from the New York law of 1866, chap. 761, which declared the privileges and franchises of savings banks to be personal property, and taxable to an amount not exceeding the gross sum of the surplus earned. In Monroe County Savings Bank *vs.* City of Rochester, 37 N. Y. 365, the law was upheld, although the bank had a portion of its property invested in United States bonds. The court held that since the tax was upon franchise it was unimportant in what manner the property of the corporation was invested. "The reference to property is made only to ascertain the value of the thing assessed."

[2] California *vs.* Southern Pacific R. R. Co., 127 U. S. 41; Delaware Railroad Tax Case, 18 Wall. 231.

[3] Philadelphia and Southern Mail Steamship Co. *vs.* Pennsylvania, 122 U. S. 345.

[4] California *vs.* Southern Pacific R. R. Co., 127 U. S. 40.

[5] Mayor *vs.* National Bank of Macon, 59 Ga. 648; City of Carthage *vs.* National

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it is a commonly accepted doctrine that no state can impose a franchise tax on foreign corporations. The whole question of the taxation of foreign as opposed to domestic corporations will be fully discussed in the succeeding essay. It may be succinctly stated here, however, that the principles of interstate comity are opposed to the franchise tax on foreign corporations, for the reason that the corporate franchise has no existence apart from the laws of the state which created it. But it is significant that Massachusetts has upheld the opposite doctrine.[1] In New York this has led to a curious legal quibble. The act of 1881 imposed the capital stock tax as a tax "on the corporate franchise or business." It was upheld as to foreign corporations as being a tax not on the franchise (which would be considered inadmissible) but on the business transacted in the state.[2] The court however says: "Whether the tax upon a domestic corporation be called a tax upon franchise or upon business is wholly unimportant." We may go farther and say that from the economic standpoint it is wholly immaterial whether the tax upon *any* corporation be called a tax on franchise or a tax on business. In an economic sense the franchise tax means nothing at all. It is so utterly indefinite that it defies exact analysis. To the student of the science of finance it is a useless conception.

V. *Criticism of the Principles.*

Let us therefore leave the domain of these legal quibbles and attempt to analyze the economic principles underlying the taxes actually in vogue, irrespective of the question whether they are called franchise taxes or not. It will be best to take them up in the order mentioned above.[3]

First, *the general property tax*, or the taxation of the corporate realty plus its visible and invisible personalty at its actual value. It will not be necessary to show the inadequacy of this

Bank of Carthage, 71 Mo. 508; National Bank of Chattanooga *vs.* Mayor, 8 Heiskell, 814. *Cf.* Report of the Secretary of the Treasury, 1889, p. 408.

[1] Attorney-General *vs.* Bay State Mining Co., 99 Mass. 148.

[2] People *vs.* Equitable Trust Co. of New London, Conn., 96 N. Y. 396–7.

[3] POLITICAL SCIENCE QUARTERLY, V, 306 (June, 1890).

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method. All the actual reforms are away from this primitive plan. We have seen in a previous essay that the standard of taxation is ability to pay, and that this ability is no longer proportional to the general mass of property. The general property tax is to-day antiquated. When it is levied by the local assessors, it becomes especially unjust. Even when assessed by a separate state board it is inexact, and exhibits all the defects of the general property tax on individuals. We may conclude, with the railroad tax commission of 1879, that as a system it is open to almost every conceivable objection.[1]

The cost of the property, as a basis for taxation, is even less defensible than the value of the property. For no one would assert that the original cost of corporate property bears any necessary relation to the present value, much less to its present earning capacity. This method is so obviously unjust as to deserve no further mention.

The capital stock at its market value. This plan is open to several vital objections. The idea is that the market value of the stock will be practically equivalent to the value of the property, or, as it is put by some of our state courts, that the entire property of a corporation is identical with its stock.[2] But as I have already observed, heavily bonded corporations would in this way entirely escape taxation. In such cases — and they are the great majority — the capital stock alone would not represent the value of the property. But secondly, even in the case of corporations without any bonded debt, the tax is unjust, because it does not necessarily bear any relation to the earning capacity. If a company without bonded debt pays dividends, then indeed the value of the stock is a fair index to earning capacity. Its value would represent the capitalized earnings. But if there are no dividends, the value of the capital stock is wholly uncertain and largely speculative, depending on the manipulations of the stock exchange. It frequently happens that non-dividend-paying stock fluctuates in value from thirty

[1] Taxation of Railroads and Railroad Securities, by C. F. Adams, W. B. Williams and J. H. Oberly (1880), p. 8.

[2] See above, p. 447.

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to fifty per cent within one year. Clearly a method of taxation which in such large classes of cases bears absolutely no proportion to the earning capacity or productiveness of the property cannot be successfully defended. We can again agree with the railroad tax commission in their conclusion that the tax on the value of the capital stock is "clumsy and devoid of scientific merit," that it "would admit of evasions in a most obvious way" and that "it is impossible of any general application."[1]

The New York statute which governs the taxation of corporations for exclusively local purposes requires the capital stock to be assessed "at its actual value in cash." In determining the "actual" value, the assessors are in the habit of taking the market value of the shares or, if they so prefer, the "book value," *i.e.* a value obtained by estimating the assets separately and deducting from the aggregate the total amount of the liabilities, actual or contingent. The latter method is employed when the market value of the stock is fictitious or artificially inflated.[2] But in principle it is open to precisely the same criticism as the other.

The capital stock at its par value. This method is open to all the objections of the preceding and to many more in addition. Moreover, it is peculiarly liable to evasion. Thus in New York it is a common practice for corporations to evade the organization tax of one-eighth of one per cent on the amount of the capital stock, by issuing a nominally small capital, but selling it to the stockholders at a premium of several hundred per cent. The market value of the stock is at once many times the par value. The sole recommendation of the tax is the facility of ascertainment. But this does not compensate for its obvious defects. The par value of stock is certainly no gauge either of the real worth of the property or of its earning capacity. This is perhaps the least defensible of all the methods, and merits no serious consideration.

The capital stock plus the bonded debt at the market value,

[1] Report, *etc.*, p. 7.

[2] Davies, System of Taxation in New York, p. 9; People *ex rel.* Bank of the Commonwealth *vs.* Commissioners of Taxes, 23 N. Y. 194.

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or more logically still, *the capital stock plus the total debt.* The justification for adding to the value of the stock the value of all that the company owes, *i.e.* the funded and the unfunded debt, is the simple fact that the existence of this indebtedness makes the stock worth just so much less. The sum of the two elements is a far better index to the value of the property than the capital stock alone; for it prevents the exemption of heavily bonded companies. This method is much preferable to any that has yet been discussed. And still it is open to some objections. Owing to the complications of our interstate polity, the proceeds of the tax, in all cases where the stock and bonds of a corporation are owned outside of the commonwealth, will accrue not to the state of the owner's residence, but to the state where the corporate property is situated. Secondly, when the tax is on bonds as well as on stock it will be inadequate, because applicable only to the bonds owned by residents of the state. Both these points will be discussed more fully in the succeeding essay. Thirdly and principally, in all those cases where the corporation pays no dividends and its stock nevertheless possesses a speculative value, the tax will not necessarily bear any relation to the earning capacity or productiveness of the company, for the reasons adduced above. In short, while this method is better than the taxation of capital stock, it does not avoid all the objections that have been urged against the latter.

There remain thus only the taxes on earnings, business, dividends and profits.

The gross earnings. This tax was the one recommended by the railroad tax commission. It possesses many undeniable advantages. The tax is certain, easily ascertained, and not susceptible of evasion. But it has one fatal defect. It is not proportional to the real earning capacity. It takes no account of the cost, nor does it pay any regard to the expenses, which may be necessary and just. For example, when the cost of building a railroad is great, its gross earnings must be correspondingly large in order to enable its owners to realize any fair return on the investment. A tax on gross earnings does not recognize this distinction. It discriminates unfairly between companies, and

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makes a line built at great expense and with great risk pay a penalty for the enterprise of its constructors. Again, a gross earnings tax takes no account of expenses. Of two corporations which have equally large gross receipts, one may be in a naturally disadvantageous position which increases unduly the cost of operation or management. Clearly its ability to pay is not so great as that of the rival company in possession of natural advantages. In short, the gross receipts tax is like the old tithe on land, the most primitive and the most unjust of all land taxes. For two pieces of land may yield the same product and yet, owing to difference in the expenses of cultivation, may bring in very different profits to the owner. The very first development in all early tax systems is to replace the tithe by a tax on the value or the profits of the property.

These defects in the proportional earnings tax are so apparent that several commonwealths, as we know, have introduced, in the case of railroads at least, the graded gross earnings tax. The rate per cent increases with the earnings. But this system of progressive or graded earnings taxation, while incontestably an improvement, removes the objection only in part; for the graduation takes place only up to a certain point. Above all, there is absolutely no guarantee that the increase of net receipts will correspond to the increase of the gross receipts. There is no necessary connection between them. A corporation with gross receipts of five thousand dollars per mile may have actually less net receipts than one with four thousand dollars per mile. A graded earnings tax would in such a case intensify the disadvantages of the first line and augment the injustice. To tax gross earnings is an essentially slipshod method.

The business transacted. This tax, while closely analogous to the gross earnings tax, does not, however, possess all its advantages. The business may be large but not lucrative. An extensive business does not even mean proportionally extensive gross earnings. The business transacted is an exceedingly rough way of ascertaining the prosperity of a corporation. It affords no accurate test of profits. It fails to take account of the personal equation which may make all the difference between good and

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bad management. Clearly the tax on business is but a clumsy device.

The dividends or *the capital stock according to dividends.* Economically speaking these taxes are the same. But from the legal point of view there is a decided difference, at least according to the opinion of our Supreme Court. The problem arises in connection with the subject of extraterritoriality, and it will be fully discussed in the next essay. But we are dealing here only with the economic problem. The dividends tax, it may be said, is good so far as it goes. But it does not go far enough. It is indeed true that objections have sometimes been raised which are of little weight. Thus it has been contended that this tax fails to reach the profits which are not divided but simply put into a reserve fund. Some commonwealths have even sought to obviate this supposed difficulty by providing that the tax should apply to the dividends, whether declared or merely earned and not divided. But this objection is of no importance. For even if the undivided earnings are not taxed, they go into the reserve or surplus fund. As this increases the corporate capital, it must in the long run lead to increased earnings on the larger capital. And as the surplus cannot be increased indefinitely, it will ultimately find its way to the shareholders as dividends, and thus become liable to the tax.

Another objection which might be urged is that a corporation may devote a portion of its earnings to new construction or to new equipment. This expense may be defrayed out of profits, instead of from the capital or construction fund. The dividends in such a case, it might be said, do not represent the actual earning capacity of the enterprise. But while this is true temporarily, the improvements made by the corporation necessarily enhance the value of the property and lead to ultimately increased dividends. So that in the long run a tax on dividends would still reach the corporation.

The real objection to the dividends tax is of quite a different character. The taxation of dividends is utterly inadequate when applied to those corporations which have bonded indebtedness. One corporation may have only a capital stock with

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earnings or dividends of five per cent. Another corporation, with the same earnings, may have collected an identical amount of money, of which one half, however, is represented by five per cent bonds. A tax on dividends, while nominally equal, would then be actually most unequal. The one corporation would pay just twice as much as the other. This objection has been recognized, but only once, in American legislation. The United States internal revenue law of 1864 provided for a five per cent (raised from three per cent in 1862) tax, which, in the case of railroads, canals, turnpike, navigation and slackwater companies, was imposed on all *dividends*, as well as on all *coupons* or *interest* on evidences of indebtedness and on all profits carried to the account of any fund. While in the case of those companies which were not presumed to have any bonded debt, like banks, trust companies, savings institutions and insurance companies, the tax was imposed only on dividends and surplus.[1] The federal law, indeed, violated strict consistency in imposing a gross earnings tax also on transportation and on certain insurance companies. But the correct implication in the law was the inadequacy of a tax on dividends alone. In fact the objections to the dividends tax are closely analogous to those that we found in the capital stock tax as over against the tax on stock plus debt. It reaches only a part of the corporate earning capacity.

We thus come finally to the tax on *net earnings*, or rather on net receipts, profits or income. Net receipts form the most logical basis for corporate taxation. The tax is not unequal in its operation like the gross earnings tax. It holds out no inducement to check improvements, like the general property tax. It is just; it is simple; it is perfectly proportional to productive capacity. In short, it satisfies all the requirements of a scientific system.

There are indeed two possible objections to a tax on net receipts. One is that the accounts may be "cooked" by paying unduly large salaries to the officers; that is, the profits may be divided as nominal expenses, thereby leaving very insignificant

[1] Act of July 1, 1862, 37th Cong., 2d Sess., chap. 119, secs. 81, 82; extended and amplified by act of June 30, 1864, 38th Cong., 1st Sess., chap. 173, sec. 122.

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net receipts or none at all. But this objection would not apply at all to the vast majority of corporations, whose stock or bonds are held by outside parties. These owners will not consent to see their dividends or interest curtailed by any practices of this nature. The danger can be real, only in respect to the few corporations in which the stock is owned entirely by the managers. But these are chiefly manufacturing corporations, which, as we know, are usually exempted from the general corporation tax. Even here, however, the danger is not very great. We hear of no complaints on this score in the American commonwealths where the net receipts tax prevails. And in Europe, where this method of taxation is well nigh universal, the objection has never been raised. It may be pronounced, thus, of little importance.

But secondly, it may be contended that the tax is impracticable in the case of great railroad corporations which, having leased lines in other states, are interested in so manipulating the traffic that the heavily mortgaged leased lines will earn little or nothing above fixed charges. Such cases are very common. The commonwealths in which such leased lines are situated, it is argued, will be robbed of the whole benefit of the tax; for the proceeds accrue to the state of the parent company. In reality, this apparent objection arises simply from a quibble about words. Of course net receipts must be strictly defined. The logical basis of corporate taxation is the total annual revenue from all sources minus all actual expenditures except interest and taxes. The reason for not deducting fixed charges, *i.e.* interest on the bonds, is the same as that which leads Connecticut to levy its railroad tax on capital plus debt, and which made the federal government tax coupons as well as dividends. Both together represent earning capacity. Although the interest on the funded debt is known by the name of fixed charges, it is in reality part of the profits which, in the absence of funded debt, would go to the shareholders as dividends. It would be suicidal so to frame the definition of net receipts as to exclude this interest on bonds. Net receipts of a corporation mean gross receipts minus actual current expenses. Any other definition would confuse the whole conception.

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In several commonwealths some very dubious and in general quite arbitrary distinctions have been attempted. The Minnesota courts have held that "earnings" means only receipts from operation.[1] Under the New York law it has been held that "income" means gross income, and that "profits" means gross not clear profits.[2] But this decision was owing to some peculiarities of the statutory phraseology. From the standpoint of the science of finance we understand by "income," net income, and by "profits," net profits. So in Pennsylvania and Alabama it has been held that income, gains or net earnings means the whole product of the business, deducting nothing but expenses.[3] The Thurman law, indeed, which regulates the relations of the federal government to the Pacific railroads, defines net earnings in a different way, *viz.*, as the gross earnings, deducting "the necessary expenses actually paid within the year in operating the lines and keeping the same in a state of repair," and also deducting "the sums paid by them in discharge of interest on their first mortgage bonds," but "excluding all sums paid for interest on any other portion of their indebtedness."[4] It is evident at a glance how utterly arbitrary this is. The explanation lies not in any economic principle but in a particular legislative provision whereby the first mortgage bonds are given precedence over the government liens. The Interstate Commerce Commission makes a distinction between earnings and income, including in earnings only receipts from transportation, and designating as income the receipts from property owned but not operated. The aggregate it calls total earnings and income.[5] But while the separation of earnings is correct, the nomenclature is on the whole confusing. The term income

[1] State *vs.* Railroad Co., 30 Minn. 311.

[2] People *vs.* Supervisors of Niagara, 4 Hill. 20; People *vs.* Supervisors of New York, 18 Wend. 605.

[3] Commonwealth *vs.* Pa. Gas Coal Co., 62 Pa. 241; Board of Revenue *vs.* Gas Light Co., 64 Ala. 269. In the case of mines, "net proceeds" have been defined; Montana Code, § 1791.

[4] Act of May 7, 1878, 45th Cong., 2d Sess., chap. 96, sec. 1.

[5] Report on the Statistics of Railways in the U. S. to the Interstate Commerce Commission, 1889.

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should be reserved for the conception net profits. In Virginia the net income of corporations is ascertained by "deducting from gross receipts the costs of operation, repairs and interest on indebtedness."[1] But this as we have seen is economically incorrect. Interest on bonds must not be deducted.

If it should be desired to obtain a more exact definition of net receipts or income in the case of railroad companies, the following would be an economically sound method of proceeding: Gross receipts consist of all earnings from transportation of freight and passengers, receipts from bonds and stocks owned, rents of property and all miscellaneous receipts from ancillary business enterprises or otherwise. From these aggregate gross receipts we should deduct what are classified by the Interstate Commerce Commission as operating expenses, that is, expenses for conducting transportation, for maintenance of roadway, structures and equipment, and general expenses of management. But no deduction should be made for fixed charges, *i.e.* for taxes or for interest on the debt, nor should any deduction be allowed for the amount used in new construction, betterments, investments, new equipment or any of the expenditures that find their way into profit and loss account. The method here suggested would lead to the abolition of one of the greatest abuses of American railway management — that of putting all possible expenses into the construction account. Our railways, for example, frequently fail to charge the maintenance and repair of their rolling stock to current expenses. When the equipment has become unserviceable, new stock is bought and charged to the construction or the profit and loss account. But in the meantime the nominal earnings of the railway will seem to have been large, and the managers will have reaped whatever temporary benefit they may have desired. The taxation of net profit in the sense that I have indicated would tend to check this practice, since deductions would be allowed for maintenance, but not for new equipment. A tax on net receipts would possess not only a financial, but also a wider economic advantage.

[1] Va. Laws of 1883–4, chap. 450, sec. 20.

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European experience all points to net earnings taxation as the best system. One country indeed still assesses corporate property in some form or other. Switzerland, as we have seen, is the only European state which has retained the mediæval system once common to all countries. The reasons, as was pointed out, are the comparative equality of conditions and the survival of the primitive villages and agricultural communities with all the circumstances of a placid and homogeneous economic life. But it is significant that many of the Swiss commonwealths in which we notice a gradual industrial development and a consequent differentiation of property, have attempted to remedy some of the obvious defects of the general property tax by supplementing it with an income tax. Thus some cantons, like Schaffhausen, Zurich, Basel, Aargau and others, tax corporations on their capital or reserve fund; but if the net receipts exceed a certain percentage of the capital, the corporations are assessed on their income. This system resembles, although in a very slight degree, the New York and Pennsylvania systems. Other cantons again, like Bern, have abandoned the general property tax, and assess corporations only on real estate and income. Finally some cantons, like St. Gallen and Neuenburg, tax corporations directly only on their income. Thus even in Switzerland, with its lurking fondness for mediæval customs, we see that the tendency is almost everywhere away from the taxation of corporate property. In the other European states this tendency has passed into accomplished fact.

In England all corporations are held to be "persons" within schedule D of the income tax. Consequently they pay a tax on their net annual profits or gains. A series of important cases has elaborated the principles that should determine the exact nature of net profits.[1] The rules laid down are analogous to those described in my definition of net receipts just given. The tax, moreover, is paid before the dividends are declared. Railroads are also subject to the special passenger duty of five per cent on receipts from passengers. But this is merely a survival of the old tax on stage coaches.

[1] Ellis, A Guide to the Income Tax Acts, 2d ed., pp. 80, 92–101.

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In France all corporations pay a tax on net profits in the shape of a three per cent tax on dividends, coupons and profits, known as the tax "*sur le revenu des valeurs mobilières.*" The tax is also applicable to joint stock companies and commercial enterprises.[1] Mutual insurance companies and similar associations have been exempted by judicial interpretation. Like individuals, corporations are also subject to real estate taxes and to the license taxes (*impôt des patentes*) on occupations. In the case of railroads, however, we still find a partial tax on gross receipts. The five per cent tax on gross receipts from freight, which was imposed after the Franco-Prussian war, proved to be so vexatious and so obstructive to industrial development that it was abolished a few years later.[2] But the old "tax on public conveyances," — a percentage on the fare, — which dates from the last century, was extended in 1855 to the receipts from passengers and express traffic. In practice, however, this "public conveyance" or transportation tax[3] is not a direct tax on the corporations at all, but an indirect tax on passengers and on consignors of express packages; for the tax is added to the price of the ticket or receipt and is paid by the individual, not the company. The direct tax thus is still one on net earnings. Corporations also pay the indirect taxes, like the stamp tax (*droit de timbre*) and the transfer tax (*droit de transmission*) on shares and bonds. But they may and generally do commute for these by paying an annual tax of one twentieth and one fifth of one per cent respectively on the amount of their capital stock. This is simply to facilitate the administrative procedure.

In Italy corporations are taxed on their income or net earnings just like individuals, by the *imposta sui redditi della ricchezza mobile.* This "revenue of personal property," as it is called, is

[1] The tax is imposed on "les intérêts, dividendes, revenus et tous autres produits des actions de toute nature" of stock companies, and on "les intérêts, produits et bénéfices annuelles des parts d'intérêt et commandites" of all associations, *etc.*, without a divisible share capital. Law of June 29, 1871, art. 1. *Cf.* Tanquerey, Traité théorique et pratique de l'impôt sur le revenu des valeurs mobilières, pp. 23, 51, 143, *etc.*

[2] Levied in 1874; abolished in 1878.

[3] Droit sur les voitures publiques. *Cf.* Vignes, Traité des impôts en France, 4th ed., I, 192.

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declared to consist, so far as corporations are concerned, in "all interest or dividends paid."[1] To make the term dividends still clearer, the law provides that "in the estimate of income are included all sums, under whatsoever title, distributed among the shareholders or added to capital, surplus or sinking fund or otherwise used in cancelling debts."[2] The Italian system is thus as comprehensive as the English.

In Germany the taxation of corporations varies widely in the different commonwealths.[3] Prussia and a few of the smaller states tax corporations for state purposes only on their realty and on their occupation (*gewerbe-steuer*). They are not taxable on income or net profits, because the shareholders are individually taxed on their income from the corporation. This point will be discussed in detail in the following essay. In all the other states, however, corporations are taxed on their income. Even in Prussia railroads have been assessed since 1853 on their net receipts. The local taxes vary exceedingly throughout the empire. But whenever corporations are taxed at all on receipts, it is on net income. Corporations were formerly exempt from the local income tax, but they are now almost universally subject to this wherever it exists.[4] Only in one

[1] Sono considerati come redditi di ricchezza mobile esistenti nello stato . . . gli interessi e dividendi pagati . . . delle compagnie commerciali, industriali e di assicurazione. Law of August 24, 1877, art. 3, b.

[2] Nel reddito delle società anonime ed in accomandita per azioni, compresevi le società d'assicurazione mutua od a premio fisso saranno computate indistintamente tutte le somme ripartite sotto qualsiasi titolo fra i soci e quelle portate in aumento del capitale o del fondo di riserva ed ammortizzazione, od altrimente impiegate anche in estinzione dei debiti. *Ibid.* art. 30. *Cf.* in general Oronzo Quarta, L'imposta sulla ricchezza mobile, 2 vols. (Turin). See also Alessio, Saggio sul sistema tributario in Italia, I, 345; the chapters on Italy in Chailley, L'impôt sur le revenu; and Burkart, Die italienische Steuer auf die Einkünfte vom beweglichen Vermögen, in Schanz's *Finanz Archiv*, VI (1889), 30.

[3] For full details as to corporate taxation in each of the German states, see Antoni, Die Steuersubjecte im Zusammenhalte mit der Durchführung der Allgemeinheit der Besteuerung nach den in Deutschland geltenden Staatssteuergesetzen. *Finanz Archiv*, V (1888), 382–499, especially 475 *et seq.*

[4] This is true especially since the Prussian Communalsteuernothgesetz of 1885. See Cohn, Finanzwissenschaft, p. 660. *Cf.* also Meier, Ueber die Frage der Communalbesteuerung (in Zehn Gutachten und Berichte uber die Communalsteuerfrage, veröffentlicht vom Verein für Socialpolitik), p. 104.

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instance are corporations taxed on their capital stock. In the case of mutual insurance companies, the dividends which the individual receives in part return for the premium he has paid can scarcely be termed net profits. On account of the difficulty of ascertaining the exact profits, Baden has therefore levied the income tax on an assumed amount of net profits, fixed at five per cent of the capital stock.[1]

The net receipts tax may thus be declared applicable in theory to all corporations. The peculiar limitations which arise from the clashing of commonwealth laws will be discussed in the next paper. It has sometimes been urged that a tax on corporate property is more just than a tax on corporate earnings, because the value of a corporate security is fixed not only by its present but also by its prospective productiveness. This is a specious objection. The answer is that under a system of earnings taxation the future product will be taxed when it ultimately appears. If productiveness be accepted at all as the standard of capacity, — and this is tacitly assumed in the above objection, — then the taxation of the product as it appears is the most logical and defensible method. But consideration for the individual producer makes it necessary to regard net, not gross product. If, therefore, any one principle be accepted as the basis of the general corporation tax, it should be net profits, and not gross earnings or property.

VI. *Practical Reforms.*

While the taxation of net receipts is without doubt the best system, it brings us face to face with the facts of our constitutional law. These, in certain cases, interpose serious difficulties. A commonwealth tax on the gross earnings of transportation companies is held to be unconstitutional, because it involves an interference with interstate transportation. In 1872, indeed, while a state tax on tonnage was pronounced unconstitutional because imposed practically on interstate commerce,[2] a tax on

[1] Lewald, Die direkten Steuern in Baden. *Finanz Archiv*, III, 807.
[2] State Freight Tax Case, 15 Wallace, 232.

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the gross receipts of transportation companies was sustained on the ground that the tax was laid upon a fund which had already become property.[1] But these refinements have lately been swept away and the gross earnings tax, in so far as it touches foreign or interstate commerce, has now been declared unconstitutional.[2] It is very probable that the gross earnings even of railroads entirely within a state, if derived from business coming from or going to another state, fall equally within the constitutional prohibition, according to its latest interpretation by the Supreme Court. A gross receipts tax on transportation companies may therefore be utterly discarded, as both economically unsound and legally invalid. Its continued existence in a few commonwealths can be explained only by the fact that the taxation is light, and the corporations therefore prefer the certainties of the present illegal system to the uncertain future of a constitutional but perhaps more burdensome system.

The question as to net profits or income, however, is much more doubtful. If a gross receipts tax is unconstitutional, will not a net receipts tax be equally so? An *obiter dictum* of the court might lead us to suppose that there is a legal distinction between a net income and a net receipts tax, and that the former as applied to transportation companies is permissible.[3] And in the recent memorandum of a new system of taxation published by a member of the revenue commission of Pennsylvania, it is assumed that such a tax does not fall within the scope of the recent decisions, but is perfectly constitutional.[4] This would be a result much to be desired. But it must be

[1] Railway Gross Receipts Case, 15 Wallace, 284.

[2] Fargo *vs.* Stevens, 121 U. S. 230; Philadelphia and Southern Mail Steamship Co. *vs.* Pennsylvania, 122 U.S. 326. Applied to telegraph companies in Ratterman *vs.* Western Union Telegraph Co., 127 U. S. 44. A license tax on telegraph companies is invalid for the same reason. Leloup *vs.* Port of Mobile, 127 U. S. 640. *Cf.* Telegraph Co. *vs.* Texas, 105 U. S. 460; Telegraph Co. *vs.* Massachusetts, 128 U. S. 39. Applied to sleeping car companies in 117 U. S. 34.

[3] The court holds that the gross receipts tax is unconstitutional because it is a tax not on *income* but on *receipts*, *i.e.* on transportation. Query, would not a tax on income then be constitutional? See 122 U. S. 345.

[4] John A. Wright, Memorandum of a System of Taxation, submitted to the commission for revision of the revenue laws of Pennsylvania (1890), pp. 10, 13.

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confessed that the final opinion of the court is problematical, in view of its extreme sensitiveness to any interference with interstate commerce.[1]

If the decision of the court should be adverse, only one course would remain open in regard to transportation companies. If a tax on net receipts is the best tax, and if a state tax on net receipts be declared illegal, a national net receipts tax might be suggested. The federal law might impose a tax on net receipts, providing for the levy, if necessary, by the commonwealth officials themselves, and apportioning the proceeds according to the mileage in each state. Such a plan would be free from all objections of an economic nature and would avoid many of the difficulties connected with double taxation. The principle would be analogous to that of the English "grants in aid." But however desirable such a plan would be, it is doubtful whether the national government has the constitutional right to levy a tax for such purposes. Entirely apart from the question of power, moreover, is the question of realization. And it must be confessed that such a federal tax on net earnings is wholly improbable, at all events in the near future. As we are seeking not only the ideal, but also the practicable, some other plan must be devised.

The only other method of taxing transportation companies which at all deserves approbation is that employed in Connecticut, *viz.*, laying the tax on the market value of the stock plus the indebtedness, in the proportion that the mileage within the state bears to the total mileage. This would be applicable to railway, telegraph, telephone and express companies, but of course not to ocean or coastwise steamship companies, which have no mileage within any state. Connecticut, as we know, applies the tax only to railroads. Such a tax would be certain, and simple of enforcement, and would attain justice as among the separate states. But, as we have seen, it would not attain perfect justice as among the separate corporations. Yet it is

[1] "In imposing [franchise] taxes care should be taken not to interfere with or hamper directly or *by indirection* interstate or foreign commerce." 122 U. S. 345. *Cf.* 127 U. S. 648.

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so far superior to all the other methods which have been discussed, that it can be strongly recommended as the type to which the commonwealths should conform their taxation of transportation companies, if the net receipts tax be pronounced unconstitutional. As to all other corporations, however, the logical and entirely practicable system would be to tax them on their net revenue according to carefully defined rules.

Thus far we have discussed only the state tax on corporations. But the lesser governmental divisions have also their claims to urge, especially in modern times, when local needs outweigh so heavily those of the states. Some commonwealths, as we have seen, exempt corporations entirely from local taxation; while a few others redistribute to the local districts a portion of the state corporation taxes. But in the large majority of commonwealths corporations are still locally taxable. This is perfectly right, even if the particular method of taxation is at fault, and for this reason: There are two separate principles in corporate as well as in individual taxation. The old justification of taxation as the price of protection can no longer be applied to the general state taxes. The science of finance has advanced beyond that standpoint. The obligation to pay taxes rests to-day on a far broader basis, which it is not our purpose, however, to discuss in this place. But as regards local taxation, there is still some truth in the old doctrine. The real property of corporations, as of individuals, is benefited in a peculiar sense by the action of the local administration. The security afforded by the public lighting and the police, the indirect results of good schools and local courts, the advantages conferred by good sewers and good roads, — enure in a special manner to the benefit of the visible property situated in the neighborhood. And as the care of these matters is entirely within the competence of the local authority, it is only fair that the property directly benefited, and which is the chief cause of the local expenditures, should help to sustain the burden. This should be entirely without reference to the question whether the property also pays state taxes, or whether

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it yields any profits to its owner. The test here is not the income, but the expenses occasioned to the local district.

Hence while the real basis of state taxation of corporations is net receipts, all corporations should be made to pay a local tax on their real estate, which is so peculiarly benefited by and productive of local expenditures. The first principle in the taxation of corporations is ability to pay, and this is best recognized by the general tax on net receipts. The subordinate but equally necessary principle of corporate taxation is the benefit derived from or the expense occasioned to the local administration; and this is best measured by the value of the real property. The principle of benefit is not the same as the principle of ability. The reasons for taxation are different, and therefore the forms of taxation should be different. The basis of local taxation, again, should be realty and not general property, for two reasons: first, because it is mainly the realty which comes into direct relations with the purely local functions; second, because the attempt to tax personalty would immediately lead again to the uncertainty and confusion from which it has been the policy of all recent reforms to extricate us.

The New York system, therefore, is unwise for a double reason: first, because it imposes a state tax on corporate real estate; and second, because it further imposes a local tax on the total corporate property. The Minnesota or the Connecticut system, as applied to railroads, is unwise because it imposes no local tax at all. The Washington system is unwise because it imposes only a single state tax which is in part redistributed to the local divisions. All these methods err because they fail to analyze the deeper principles that underlie corporate taxation.

The plan of levying a general state tax and distributing a part of the proceeds to the counties or municipalities contains a fruitful idea. The system is already in vogue in an incomplete way in a few commonwealths.[1] But it is susceptible of great expansion and may thus be of considerable value in solving the vexed question of purely local taxation. In so far as corporations are

[1] For details, see my monograph on Finance Statistics of the American Commonwealths, pp. 40, 41.

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concerned, however, such a plan of redistribution is entirely premature. Until the proceeds of the state corporation tax are sufficient to enable the commonwealth to dispense entirely with the state tax on real property, nothing of the kind should be contemplated. Whatever claims the local divisions may justly have on the overfilled treasury of the commonwealth, must be set aside until the taxation of real estate is left exclusively to them. The abolition of the state tax on real estate is perhaps the most necessary reform in our general system; to this all other reforms must be subordinated. If indeed the commonwealth treasury should be supplied though other sources, such as a state inheritance tax or a state income tax or a state tax on other elements, then it would be possible not only to abandon the state taxation of real estate, but also to relinquish to the localities a portion of the state corporation taxes. But until that time arrives, a distribution of the corporation taxes among the local divisions will be inadvisable. The logical plan for the immediate future is to tax corporations on their net receipts for state purposes (with the requisite qualification for transportation companies), and to tax them on their real property for local purposes. This, and this alone, satisfies all the demands of scientific method and of practical policy.[1]

EDWIN R. A. SELIGMAN.

[1] The next essay will be devoted to an economic analysis of the intricate problems of incidence and double taxation as applied to corporations.

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HISTORICAL JURISPRUDENCE IN GERMANY.

WHEN the reception of the Roman law in Germany had become an established fact, there followed a period, culminating about the middle of the sixteenth century, when the whole western part of continental Europe recognized practically one system of jurisprudence. In Germany, wherever, as in the lower courts of limited jurisdiction, the administration of justice had not lost its close communion with popular custom and sentiment, the principles of Germanic law preserved their identity; but they no longer commanded respect or recognition among those who studied and practised the law as a profession. The spirit of the Renaissance had exerted as strong an influence in this as in any other field. Ever since the opening of the Italian universities, young Germans of rank and ambition had crossed the Alps to share in the newly revived learning of the Roman law, and with their knowledge of the *Pandects* they carried home an open contempt for the native laws of their own country. While the codified systems of the Roman, the canon and the feudal law were adopted entire, the German laws were recognized only as special customs, to be proved as facts and to be operative under Roman theories of prescription. It is not difficult to understand the irresistible fascination which a system like that of the *Digest* must have had for the legal mind; the influence of Italian jurists is more remarkable. Many parts of the Roman law had necessarily to be excluded from the reception as altogether unsuited to the conditions of the age; but even in this sifting and rejecting process, the precedent of Italian commentators was closely followed in Germany. The methods of the Italian schools where the Roman law had first been taught were naturally enough adopted in the new German universities, — methods in which a close regard for practical application excluded any free scientific treatment of the material. The same foreign influence is

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manifested by the great number of Italian collections of cases and precedents that were published in Germany. The connection with France was hardly less close than with Italy. The authority of such civilians as Cujas and Doneau was recognized throughout Europe. The latter taught law at Heidelberg; and many other French jurists, when forced to leave France on account of their Protestant faith, found an honorable refuge in German universities.

This international unity of the science of jurisprudence would have been impossible without the general use of Latin as the common language of all learning; but it depended still more upon the substantial identity of legal principles among the various nations, which resulted from the recognition of the Roman law as the governing system. The Holy Roman Empire considered the Roman law as a natural inheritance, and the territorial princes found that its adoption served their own dynastic interests. Its study was a necessary qualification for any higher official career, and in point of dignity the degree of doctor of laws was considered equivalent to a title of nobility. It was natural that such advantages should attract the best talent among the younger generation. That the Roman law was in a manner unpopular, foreign and exclusive, far from weakening its hold upon lawyers, was more likely to have the contrary effect. Certainly such a consideration could have no weight against the admitted technical and scientific superiority of the *Digest*. But notwithstanding all these elements of strength, it is difficult to conceive how the Roman law could have spread so widely without some measure of popular support. As a matter of fact, it met with little favor on the part of the common people. It was one of the principal grievances of the peasants at the time of their great revolt in the sixteenth century. Their protests and remonstrances, however, had little effect. In a struggle between two legal systems, technical perfection counts for more than popular sentiment; and in technical perfection the German law was hopelessly inferior. In the eyes of the civilians it was a barbarian, almost a foreign system. The attempt to re-publish some of the old German popular

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codes was actually criticized as a violation of Justinian's edict against the revival of antiquated laws. The Germanic system could not be destroyed; but the very hope of its preservation lay in a temporary defeat, which compelled it to yield and to withdraw into lower and more limited spheres, where obscurity was its best protection.

It is impossible to say what the outcome of this period of legal history would have been, if there had been a constant and uninterrupted progress on the lines of development then laid down. We may picture in imagination as the final result, a system of universal law raised upon the basis of an international science of jurisprudence. But in the light of actual history, this period of unity appears rather as a period of preparation and transition, during which the germs of national formations were slowly maturing, which were to be engrafted upon the common Roman stem. In the seventeenth century came a reaction. It was directed on the one hand against the purely exegetical and practical treatment of the Roman law; on the other, against its absolute domination, to the almost total exclusion of territorial customs. Thus two opposite tendencies prevailed at the same time: one, mainly speculative, seeking to overcome the limitations of the Roman law by resort to the utopian regions of a law of nature; the other, under the influence of the new inductive philosophy, opposing the foreign system by a patient study of positive facts and by a return to the rich material of native law and custom. The former tendency was represented chiefly by Pufendorf; the latter marked the beginning of historical jurisprudence, and found its foremost representative in Conring, whose work *De Origine Juris Germanici* was published in 1643. In the light of sober historical investigation many an argument in favor of the Roman law was now discovered to be a fallacy. It had been generally believed, for example, that the Roman law had been introduced by an express act of imperial legislation; Conring showed that this was an error. The Roman law thereby lost a fictitious title, and its claim to recognition was put upon the true foundation, *viz.* the reception by the universities and by the

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practice of the learned judges. The study of jurisprudence, which up to that time had been almost entirely concentrated upon the *Institutes* and the *Digest*, now began to embrace those Germanic legal institutions which the Roman law had never been able to eradicate. Since the Roman law was recognized to have been received by custom, it was now admitted that such parts as were not congenial to German ideas and institutions could not have been included in the reception. Efforts were made accordingly to assimilate the two systems, and the result of this modernizing and Germanizing process was the so-called *usus modernus Pandectarum*, which became the basis of German civil law. Beyond this, however, jurisprudence gained neither in method nor in content. The scientific work, if it may be so called, consisted chiefly in disquisitions on dogmatic and practical subjects, and, so far as it was historical, in the collection and study of antiquities.

The eighteenth century is not remarkable for any great movement in German scientific jurisprudence. The humanitarian philosophy which, having become popular in France, had spread from there into Germany, and which led to reforms often of a revolutionary character in all departments of legislation, was merely the consequence of movements of thought and speculation that had originated in the preceding century. It carried no new life into the work of theoretical jurists. The only man who approached the study of legal institutions with more than the spirit of the abstract philosopher, antiquarian or practitioner, Justus Moeser, was not a man of the universities. He opposed the new philosophical school that drew its inspiration from France. His essays breathe the true historical spirit; but his conclusions are frequently vitiated by a preference for the "good old times," which forms the burden of all his writings and which at times makes him appear narrow and extreme. His work, moreover, lacked scientific method and completeness. But he at least gave inspiration where the professors failed to awaken the faintest interest. Complaints about the dry and barren character of the study of jurisprudence at the universities were loud and general. Men of genius and ability, like

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young Goethe, found in this department of learning nothing that could attract them, and the law was studied merely with a view to the professional career to which it afforded access. And yet at the end of the last century the state of the private law in Germany was such that a scientific and historical examination of the whole field was greatly needed. The multiplicity of systems was most bewildering. The Roman and the German law stood side by side with conflicting claims and uncertain boundary lines. The former was at least a unit in form and in theory; but the latter was split into as many different varieties and systems as there were or had been sovereign territories in Germany, — and their name was legion. There had accumulated a vast wealth of legal material, unsifted and undigested. The time had come to create out of this incoherent mass one organic whole, — to establish unity of law, by perfecting the naturalization of the Roman and searching out the fundamental principles of the German system, and by reconciling the conflicting tendencies of the two. The various attempts to bring order into this chaos by codification show how urgent was the need of reform, and it was eminently desirable that the practical work of the legislator and statesman should be guided by principles which could be revealed only by the patient researches of the student and the scholar.

The time was favorable to scientific reforms. Kant's critical philosophy had stimulated all departments of intellectual activity into new life, while the achievements and the spirit of a classical literature were infusing some elements of broad and enlightened culture into even the most pedantic learning. Again, from a somewhat narrower point of view, the study of jurisprudence profited by the intense national spirit which, in the beginning of the present century, revived interest in whatever was German in character and purpose, — in German language, German history, German antiquities and even in German law. Fortunately, the same time in which these conditions were combined also furnished the men who could turn them to account. Two men above all others are identified with the renaissance of jurisprudence: Eichhorn and Savigny. Niebuhr,

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the historian, lent his invaluable aid from a neighboring field. His investigations and discoveries in the earlier periods of Roman history had a direct bearing upon the knowledge of the Roman law in its beginnings. Eichhorn created the historical study of the German law. He was the first to present its history in a connected and organic form, emphasizing at the same time the place of legal institutions in the general life and history of the nation. Niebuhr's *Roman History* appeared 1811, Eichhorn's *History of the German Law* in 1808, Savigny's treatise on *Possession* in 1803.

Savigny's leading position was secure from the first, and his fame has not been eclipsed by that of any other jurist. The impression which his strong individuality made upon his contemporaries must have been wonderful, and some of this personal influence seems to have been perpetuated in his writings. His work alone would have been sufficient to effect a complete regeneration of jurisprudence. He found it a dry and formal system of learning; he left it a liberal science of infinite possibilities. He was to the science of law what Lessing was to literature, what Niebuhr was to history, or Ritter to geography. His work, like Blackstone's, is still read and studied while all earlier legal writings have become antiquated. The effect of his very first treatise was marvellous. His historical genius, the elegance and precision of his reasoning and his classical treatment of legal subjects raised jurisprudence at once to a height which it had never before approached. Up to that time the *Digest* and the *Institutes* had been treated merely as a code or statute book, — a collection of rules to be adapted, as best might be, to the requirements of modern practice. The Roman law had been regarded as a system that had to be accepted, because it was the law in force. Scientifically it had hardly advanced beyond the stage in which Justinian had left it. The Romans themselves had not treated it as a science, had not penetrated into the *raison d'être* of its principles, or attempted to study the relation between the various parts of a complicated organism. They had, however, the same justification or excuse that the English lawyers have now, namely, that the law was a

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creation of their own and part of their life, and that they supplied the fundamental unity of system by their own living conceptions and by the spirit of a truly national jurisprudence. To the Germans, however, the Roman law was really a foreign body, which, to be absorbed and assimilated, had first to be digested. If it was not to remain a foreign system — so it was argued — the German jurists would have to analyze its principles, and out of these principles to construct a scientific jurisprudence, thus making it a new and national creation.

It is obvious that this treatment of jurisprudence was above all historical. However satisfactory the old method was for the routine of practice, it was certainly impossible to comprehend the vital spirit of the Roman law without a knowledge of the various phases of growth through which it had gone. Savigny became the enthusiastic leader of the new historical school which found the centre of its activity in the recently established University of Berlin. In 1815, the publication of a *Journal of Historical Jurisprudence* was undertaken by Savigny, Eichhorn and Goeschen. In the first number Savigny developed a sort of programme of the aims and views of the new jurisprudence. Evidently there was only one true method of legal science, and Savigny was its prophet. Already in 1814, in a small treatise on the *Vocation of our time for Legislation and Jurisprudence*, which became famous in connection with the question of codification, he had laid down the views which were accepted by the historical school as to the nature and origin of law. He started from a conception of law which was then new, but from which few would now withhold their assent, even though unwilling to concur in all of Savigny's conclusions. Law to him was a creation of the collective national mind, intimately interwoven with national life and character and with the permanent conditions of the national civilization. It was no more the product of an arbitrary will than language or religion. The work of many generations, it was beyond the absolute control of any particular age. Therefore Savigny regarded historical continuity as the first condition of healthy national life. "The true doctrine," he says,

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teaches that every age creates its world not for itself and arbitrarily, but in close communion with the whole past. In consequence, every age must recognize something that is given, which is necessary and free at the same time: necessary because not dependent upon the arbitrary will of the present; free because as little dependent upon a foreign command, but rather produced by the higher nature of the people as a constantly growing and developing body.

And more particularly with regard to jurisprudence:

The substance of the law is given by the whole history of the nation, not arbitrarily, so that it might happen to be this or that or something else, but grown out of the genius of the nation and its history. The deliberate effort of every age must be directed towards the task of understanding, renewing and keeping alive that necessarily given material.

"The historical conception of law," says an eminent German jurist,[1]

sees in the mass of existing rules, not the aggregate product of individual and separate wills, but the creation of the nation's legal instinct, evolved out of the conditions of changing moral ideas, economic and other determining influences, the result of national reasoning for thousands of years, which in the formation of a national system of law has to overcome difficulties and obstacles of all kinds. The historical conception of law does not merely deal with the interpretation of statutes, but its task is to teach the comprehension of a rule of law as the last formal expression of a process at work in the national genius; it attempts to reproduce the peculiar mode of legal thought of every age, and thus represents the connection of law with the moral life of the nation. A natural consequence of this principle in its application to German jurisprudence was the division of the material into the two great masses of Roman and German law, because only in this separation the view of the connection between nationality and law could have its full force.

To Savigny and his school the understanding of the past involved a close study of all preserved records and authorities. The work of historical investigation was, however, to be confined to the Roman, the German and the canon law. From the very beginning the most excellent results were achieved in

[1] Gerber, formerly professor of jurisprudence at Leipzig.

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this field by such men as Savigny, Eichhorn, Niebuhr, Rudorff, Grimm and many others. By a peculiar favor of circumstances it was just at that time that the material for historico-legal research was enriched by the most valuable additions. In 1816 Niebuhr, by a happy chance, discovered at Verona the palimpsest from which the greater part of Gaius's invaluable *Institutes* was given back to the world. There followed in almost unbroken succession a series of other important discoveries, partly of manuscripts, partly of inscriptions on monuments, *etc.* The importance of these latter records enlisted this branch of archæology most successfully in the service of historical jurisprudence. Even now, in retracing the work done in Savigny's days and under his guidance, we can feel some of the enthusiasm which inspired a number of the ablest scholars to co-operation in a field in which they were virtually pioneers. Savigny's greatest historical work was the *History of the Roman Law in the Middle Ages;* and with very few exceptions, his minor treatises and dissertations dealt with Roman law. Eichhorn was recognized as foremost in the department of German legal history. The lead of these two was followed by a host of scholars of ability and astonishing industry. The admirable and efficient organization of science in the universities secured the necessary distribution of labor, with an intelligent appreciation of the work to be done. All the recesses of German and Roman legal history were explored; the old German codes were re-edited, the inexhaustible records of municipal history were investigated, the philological method was applied to the criticism of Roman legal writers, and the collection of inscriptions was undertaken on a systematic plan. Every branch or phase of German or Roman legal history was searched and researched with the utmost patience, and with constant rejection or modification of former results, — the comparative freedom from the worship of authority being one of the chief distinctions of German scholarship, as it was the indispensable condition of scientific progress.

It is, however, pertinent to ask how far Savigny's ideal conception of the value and aim of historical jurisprudence was verified. On this point the jurist above quoted says:

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It is well known how this historical principle influenced the development of our science. The right knowledge of actual law was infinitely promoted. And this knowledge was deepened to an extent hardly anticipated, resulting not only in the formal abstraction of ideas and principles, but including the conception of ultimately practical considerations. So also the practice of the law has gained; for all deeper historical knowledge of law affords greater ease and security in determining its present applicability. Especially the science of the German law, embracing as it does an extraordinary mass of native material, has gained a height from which alone every individual expression of particular laws can be truly measured. This distinguishes German jurisprudence from that of other civilized nations. Compared with the English learning of statutes and precedents, it is a true science in the highest sense of the word, constantly aspiring to these two great aims: to comprehend the wealth of historical growth, and to transform the ideas underlying the historical material into forces of actual and present operation.

This was the view of the historical jurists, which, however, was not allowed to pass without opposition. Something like partisan spirit was carried into the question by the antagonism of the so-called philosophical school. When Savigny explained the principle and the scope of the historical school, he alluded to another school, which seemed to him so indefinite, so unprincipled and so mixed of various elements, that he could find no better term for it than "unhistorical." This implied, of course, that his school embraced everything that was true, scientific and excellent; the other school, all that was the contrary. This other school, however, was not without its able advocates, foremost among whom was Professor Gans of Berlin. To most students Gans is little more than a name; but in his day he was the leader of a party and somewhat of an intellectual power. As he is mentioned repeatedly in Heine's works, his name is secure from entire oblivion; although the nature of Heine's comments may hardly appear gratifying to Gans's admirers. Gans professed himself an enthusiastic follower of Hegel, and the darkness of the master's teaching so obscures the legal philosophy of the disciple, that sometimes we stand hopeless before the oracles of his wisdom. But the preface to his *Law of Suc-*

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cession in its Universal Development is well worth reading, as an exposition of the tendencies of the two opposing schools and as a reply to Savigny's arguments.

The point at issue between the two schools was really as old as human nature and common to all science. It arose out of the conflicting claims of the past and the present. The historical jurists were strongly impressed with the power of historical conditions, the force of tradition, the danger of change, the value of conservative sentiment, the accumulated experience of by-gone ages, and the tenacity of habits of life and thought by mere force of prescription, — all conditions of strong effect in the domain of private law. The philosophical jurists stood for actual and living forces that ought to assert themselves against the influence of ages that were dead and buried, and against a past that had no rights except by sufferance from the present. It might seem that the science of jurisprudence was not required to give a decision favoring one view or the other, — that its function was to measure the conflicting forces, to determine their mutual operation and interaction and to recognize both alike as necessary elements in the evolution of law. The conflict between the two schools would then have been of a purely abstract character, involving only the relative strength of the antagonistic elements. But the natural desire to be felt as a controlling influence in shaping practical affairs led constantly to encroachments upon the domain of legislative problems.

The two parties first joined issue on a question that could never be solved by theory, — that of the codification of the civil law for the whole of Germany. Thibaut had started the controversy by a pamphlet strongly advocating such codification, and Savigny replied in the famous essay on the vocation of his age for legislation and jurisprudence. He made this the occasion of an elaborate discussion of the rise and growth of private law. As is well known, his conclusion was that, since law was chiefly a product of given historical conditions, a full understanding of those conditions was the indispensable prerequisite of any productive activity, and that his time was not qualified for such a task. Practical reforms would have to wait

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until science and theory had done their work. It is easy to understand that such a view would meet with strong opposition. The age which had seen great reforms in government and administration, would hardly be inclined to proclaim its own impotence in dealing with the problems of the private law; and the idea of deferring reforms until science should have completed its task and theorists should have arrived at a unanimous conclusion, could not appear acceptable to practical statesmen. The philosophical school, moreover, considered the burden of historical survivals heavy enough without increasing it by constant reference to the past; and they knew that the habit of looking backward was not favorable to the spirit of reform. The conscious and artificial revival of conditions of the past which was urged by the historical school must not be identified with that instinctive conservative sense of historical continuity which lives in English jurisprudence, and there satisfies the conditions of legal development required by Savigny. Such an instinct cannot be created by any amount of historical study. Yet the jurists of Savigny's school considered their science merely in the light of a great school for practice; it was declared that all historical studies should find their consummation in a truly national code. This position was attacked by the philosophical school, and here it presented a strong case. Gans clearly distinguished between the art and the science of law, and sneered at the idea of a science which was to be merely the handmaid of practice. He repudiated the absolute dependence upon history, urging the rights of the living against the claims of the dead. "It is true," he said, "that in every time there lives the whole past, but the past changed into another moment. The actual and active present must not be conscious of that past; life must not feel the death out of which it has grown."

Returning to the purely scientific aspect of the controversy, it was natural that fair-minded representatives of either school should see that jurisprudence could not rest on either philosophy or history exclusively. This difficulty was overcome by each side arrogating to itself the credit of a true combination of both

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elements. Savigny, as we have seen, refused to his opponents any designation but that of "unhistorical," claiming the true philosophy for himself; and his fundamental conception of law was doubtless philosophical, formed more by intuition than by historical researches. On the other hand, the philosophical school admitted the value both of Savigny's views and of his followers' achievements; but they insisted that the former were too narrow and the latter too barren; they required something besides history, and laid the principal stress on that additional element.

It cannot be denied that, from the scholar's point of view, the historical stands far above the philosophical school. The former had the advantage of being led by men of unrivalled scholarship. It wasted no time on general theories. It was not split into dissenting sects. The direction once given, the possibilities of valuable work in the field of historical research were unlimited. With the philosophical school we are not here concerned further than to show its opposition to the historical school. An intelligent criticism of its work would require an extended review of the condition of German philosophy in the first half of this century, for which this is not the place. The fact must however be stated, that while the aims of the philosophical school were large and profound, and scientific in the best sense, it was very poor in corresponding tangible results. This failure had the effect of bringing legal philosophy generally into disrepute, and this, again, reacted unfavorably upon the historical school. The tendency of that school was naturally to overestimate the value of positive data and to concentrate its energy upon historical detail. Savigny himself encouraged this.

> It is the triumph of historical science [he said] if it succeeds in conveying the results of its investigations to our mind directly and immediately, like a living reality. . . . But it is not always possible so to penetrate into the true spirit of history, and the effort to accomplish no less result than this inevitably leads to a superficial treatment, which, with an empty pretence of philosophy, is indeed more barren than the opposite purely positive tendency.

He quotes Goethe's words: "I do not know of any worse pretension, than if one claims to understand the spirit, to whom

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the letter is not clear and familiar"; but he fails to add that no accumulation of letters will supply the spirit, unless they are read by a light which has to come from other sources. The exaggerated view of the importance of a mass of facts and data easily leads to a form of science which thrives on industrious and painstaking mediocrity, which revels in minute criticism and ingenious conjectures — erroneous, as has been shown, in nine cases out of ten — and to which the discovery of new manuscript is the highest triumph of scientific achievement:

> Und ach, entrollst du gar ein würdig Pergamen,
> So steigt der ganze Himmel zu dir nieder.

There is some force in what Gans said in opposition to Savigny's views:

> The historical school has generated among jurists a deep-seated hatred of philosophy and of all thought not engaged in the discovery of facts, — a hatred which here appears directed against philosophical law, so that it is mentioned only with a sneer and with reprobation, as if the historical jurist could have no pure conception of history, were he to acknowledge a law of nature. Out of this school also has proceeded the worship of what is outward and positive. To every note and passing dictum an exaggerated importance has been attributed, and under the noise and clamor of that worship the true essence, the spirit, has been completely lost.

Perhaps this statement is colored by partisan spirit, and allowance must be made for exaggeration. The historical school had doubtless widened ideas of law and given a higher dignity to the science. In its beginning the school had felt the call of a mission, in which it had by no means entirely failed. But it would have been difficult for any movement that began with so much genius and inspiration to maintain itself on the same level on which it had started. The nature of the work itself invited a waste of energy. It is an apparent advantage of legal history that most of its material is presented to us directly, and not through a medium. It may seem as if the legal authorities, if completely collected and correctly transmitted, were really perfect and unimpeachable evidence. But this view does not take

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into account the unavoidable imperfections of the law as it is written and reported — its uncertainties, gaps and inconsistencies. Moreover, there is often a strong undercurrent of living sentiment which is at variance with the formal expression of the legislator's will. The law as it appears on the statute book may be different from the law which practically governs civil relations. The true principles must sometimes be read between the lines, and the "notes and passing dicta," of which Gans speaks, often contain valuable information. For this reason a peculiar significance may attach to any term or expression under given circumstances. The historical jurists were therefore constantly tempted into drawing distinctions of the utmost subtlety, into interpretations that could be neither proved nor disproved. They were prone to establish doctrines on very slender foundations, and to engage in interminable disputes that could lead to no result. With a constant recurrence to the same problems and a never-failing crop of small controversies, there was a lack of large and fundamental theories that might have advanced the true conception of law; and the vain attempts to carry conviction to other minds, in cases where the evidence was susceptible of more than one interpretation, absorbed much labor and ingenuity that might have been employed to better advantage.

There was one resource against the dangers flowing from these peculiar difficulties of evidence, and that was to extend the field of observation. The information derived from different systems of law would have been an admirable corrective for doubtful conclusions drawn from defective or misleading premises. But this was just what the historical school neglected to obtain. We have seen that in their practical views they always referred the present to the past; in their theoretical work, many of them fell into the graver error of constantly referring the past to the present. Historical study was a school of civil legislation; therefore historical research was burdened with a practical purpose which did not advance the true interests of science. Savigny himself, by precept and by example, had encouraged the limitation of historical jurisprudence

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to the Roman, the canon and the German law. The few writers who ventured outside of this territory confined their researches in foreign law chiefly to public or *quasi*-public institutions. To the philosophical school is due the credit of having insisted, from the very outset, on the value of comparative jurisprudence. They pointed to Montesquieu's work as a step in the right direction, while the historians undervalued, perhaps, its easy deductions and wide generalizations, bold indeed, and often mistaken, yet eminently suggestive. Thibaut had said that ten clever lectures on the jurisprudence of the Persians or Chinese would convey to students a better understanding of law, than a hundred on the miserable failures in the legislation on intestate succession from Augustus to Justinian. Gans placed these words at the head of his great comparative study on the laws of succession, while Savigny made them the subject of sarcastic criticism. But with few exceptions, the philosophical school did little or nothing to work out its own suggestions. The solid and conservative work of the historical school attached to it the best scholarship in legal science. With all their faults, the historical jurists were at least first of all jurists; the representatives of legal philosophy were first of all philosophers, and some of them were no jurists at all. No reform in jurisprudence could be successful without enlisting the forces of the former school.

It is significant that dissatisfaction is beginning to spread in the ranks of the historical jurists. There is a feeling that the results obtained stand in no just proportion to the immense amount of labor that has been expended. The great achievements in other departments of science have aroused in many jurists the unpleasant consciousness that they are lagging behind in the race. They find it no longer possible to work in self-sufficient isolation, and to disregard the larger standards established by new discoveries in other fields of knowledge. It is becoming generally recognized that Savigny's fundamental theory of law cannot remain unshaken for all time. It has been remarked that his conception of the origin of law as exclusively national, fails to explain even so important and

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familiar a fact as the reception of a foreign system of law in Germany. His philosophy is beginning to be seriously attacked even by representatives of the historical school. In an article published about two years ago, "On the boundary lines of historical jurisprudence," Professor Bekker, of Heidelberg, takes a despondent view of the condition of his science. He asks for reasons why jurisprudence is outrun by natural science, history and even philology, both in actual results and in popular interest. The latter he is sure will come with the former; for it is only success that attracts. He demands better method and better co-operation, and, with the true scholar's spirit, more thorough investigation of the material. At the same time, and very wisely, he recommends the adoption of a more attractive style of writing, a most desirable reform in view of the forbidding and esoteric character of most legal works. "Where we do not write for scholars only," he says, "still our works are written for a strictly limited public of students and practitioners. The art of treating questions of jurisprudence scientifically, and at the same time in a manner that is generally intelligible and interesting, has become rare." But it is admitted that the fault lies chiefly with the narrow range of the science, and that the true remedy is to be found in the application of the comparative method. In view of the fruit this method has borne in natural science, its adoption has become a necessity. Even the very limited use thus far made of it in jurisprudence has almost accomplished a scientific regeneration.

In this new field both historical and philosophical jurists may meet to work together. The historical school virtually abandons its old exclusiveness, although it does not admit the priority of other claims. It is still filled with the inherited distrust of philosophical speculation. Professor Bekker, in his article, makes no reference to Ihering, or Dahn, or Post, prominent leaders of the new movement; and yet Ihering has in a large measure solved the problem so anxiously discussed by Bekker. In his *Geist des römischen Rechts* — that marvel of ability, as it has recently been called by an English critic — he has almost succeeded in making jurisprudence popular. His work presents

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a most attractive combination of historical and philosophical treatment, and he makes excellent use of the limited store of foreign law at his command. We may agree or disagree with his theories and conclusions; but his method ought to commend itself to jurists, if not for its intrinsic merit, at all events for its undoubted success.

In Germany, the adoption of a civil code for the whole empire, which is now under consideration, may also be expected to have a salutary effect upon jurisprudence. So far both Roman and German private law have, in their traditional form, been in actual force, though limited by a continual reduction both in territory and in range of subjects. This fact has necessarily affected the historical treatment of legal questions. Even where codes have existed, the two historical systems have been felt to be of practical influence as the common law of Germany. To a certain extent this will continue to be the case for some time; yet the new formal creation of a national body of private law will, by placing practical jurisprudence upon a modern and well-defined basis, relegate history to the position which it ought to occupy. In this sense the new code may effect an emancipation of science from subserviency to practical considerations, and may set free energy and interest for a higher treatment of jurisprudence. Some such view is taken by Ihering when he says:

> The fact that the Roman law has been superseded formally in the greater part of the territory where it used to be in force, is of the same determining influence upon life and science as its former reception. The formal unity of the science resulting from the recognition of a common code in the greater part of Europe — the collaboration of jurists in the various countries on the same material and the same task — is gone forever. Science has been degraded to sectional jurisprudence; political have become scientific boundaries. A lamentable and unworthy condition of science! But it is in its own power to break down such barriers and, in the form of comparative jurisprudence, to secure for all time that universality which it so long enjoyed. The method will be different, the judgment more matured, the treatment of the material more liberal, and the apparent loss will be a gain, raising the science of law to a higher level.

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We may concur in the hopes so eloquently expressed; but it can scarcely be admitted that the collaboration of the jurists of various countries is gone forever. On the contrary, the methods of comparative jurisprudence can be successful only through such collaboration. Any highly developed system of private law must receive its scientific interpretation, in the first instance, from those who are in close contact with its practical operation; and it is from those that foreign jurists must draw their information. Germany alone cannot produce a science of comparative law unless aided by the jurists of other countries. And from no quarter could the Germans derive more valuable aid than from English and American jurisprudence. At the beginning of this century the civil law of Roman origin was virtually the common law of Europe, and therefore of the civilized world. The private law of England presented almost an anomaly in its isolation. But since then the English common law has spread over a new world, and rules now as wide a territory and perhaps as many people as the civil law. We have thus two great legal systems, standing side by side, assimilating rapidly through identical conditions of civilization and the close intercourse of nations, but without losing their historical continuity. The understanding of legal problems must gain infinitely through the study of the evolution of two systems, from independent sources and in different forms, to substantially the same results. But this work has hardly been begun as yet. The comparative study of jurisprudence is now chiefly confined to primitive systems of law. But the village community and the patriarchal system are not a sufficient foundation for a science of law. To a philosophical conception of law, the study of its early beginnings is no more essential than that of its more refined developments; and in this latter study there is the great advantage that, its data being accessible and abundant, its conclusions need not rest upon a basis of uncertain evidence and doubtful conjecture.

ERNST FREUND.

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ITALY AND THE VATICAN:

THE POLITICO-ECCLESIASTICAL POLICY OF BARON RICASOLI.

AFTER the death of Count Cavour, the central figure among the patriots and statesmen of the Italian revolution, with the exception of King Victor Emmanuel himself, was unquestionably the Baron Bettino Ricasoli, leader of the parliamentary Right, or *Moderati*. By intellectual conviction and spiritual loyalty a devout Catholic, he was at the same time the uncompromising opponent of ultramontane principles, and the most eminent among the lay advocates of a liberal reform in the church of Italy. Some knowledge of Ricasoli's politico-ecclesiastical policy and of the principles upon which he attempted, however unsuccessfully, to settle the mutual relations of church and state is necessary to a clear understanding of the Italian politics of that period, as well as of the ecclesiastical problem which even yet awaits its definitive solution at the hands of Italian statesmen and church authorities.

The representative of probably the oldest existing family in Tuscany, and in personal character an illustration of the finest type of the ancient Italian nobility, Ricasoli took little part in public affairs under the Lorraine dynasty; though his counsel to the grand duke in 1848 and again in 1859 placed him at once in the front rank of Tuscan patriots. He held for a short time, in the former year, the office of gonfalonier of Florence. After the Florentine revolution of April, 1859, he was called to occupy the ministry of the Interior in the Tuscan provisional government of Boncompagni, — a position which insensibly became in his hands a practical dictatorship, by virtue of which, as well as of his sternly inflexible political integrity, he was able to resist the demands and to thwart the intrigues of the French Emperor, and to secure the grand duchy, and

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with it all central Italy, to Italian unity and nationality. It was at this time that he declared it to be thenceforward his policy "*il sommergere questa povera Toscanità nell' oceano dell' Italianità*" (to sink this poor devotion to Tuscany in the ocean of Italian nationality).

While Ricasoli thus practically held the future of Tuscany in his hands, Monsignore Limberti, archbishop of Florence, addressed to him, in December, 1859, a semi-official complaint of the governmental sufferance under which a certain Mazzarella, a lay evangelist then preaching in that city, was assailing the church. It was in his reply to this complaint that Ricasoli first publicly declared the principles of his later ecclesiastical policy. "Liberty of conscience and the free exercise of public worship," he wrote to Monsignore Limberti, under date of December 16, 1859, "[are each alike] a right of every one who is responsible to God, . . . a fact of the universal consciousness and a principle of the public law of every civil state." He significantly recognized "the Catholic religion, if no longer dominant, yet as prevalent" in Italy. In harmony with this language, Ricasoli, when governor-general of Tuscany in 1860, under the North Italian *Statuto*, refused to give formal permission for the opening of an American Episcopal chapel in Florence, on the express ground that to grant such a permission would imply a right in the government to withhold it; whereas he insisted that the free right of public as well as of private worship was inherent in every one, and that it was so recognized by the new constitution and political principles of Italy.

The death of Cavour in June, 1861, at almost the very hour when the union of southern with northern Italy was consummated in the Parliament of that year, arrested abruptly the onward progress of the national movement. The King and the people alike turned to the stern and resolute Tuscan patriot, whose acceptance of the succession, under the circumstances, was declared by Count Mamiani on the floor of the Italian Senate to be an act of "civil heroism." On this occasion, an address to him published in the *Gazetta del Popolo* contained the following expressions, which are noteworthy as the language

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of one who knew Ricasoli personally and well, and as having been, in all probability, first submitted to him for his sanction :

> You have recognized that religious conviction is a sanctuary within which the civil power may not enter, — every man having an inalienable right to establish with the Divinity such relations as he may deem right, of which relations his own conscience is the only judge. . . . You have recognized that religious liberty is not merely a right, but an imperious necessity of human nature ; that it is itself a law, even before its formal utterance, and the code can proclaim but not create it. . . . You have recognized that, as liberty of conscience is a right of the individual, so liberty of worship is a right of the community.

On the first of July immediately following, the new prime minister laid before the Italian Parliament the programme of his proposed government, and especially an exposition of his policy for the solution of the Roman question. At the instance of Cavour, Parliament had formally declared the city of Rome to be the necessary capital of Italy ; but it had been left to those who were to come after to reduce that declaration to actuality.

> We intend to go to Rome [said Ricasoli], not destroying, but constructing ; providing the opportunity, opening to the church the way of self-reformation ; giving to it that liberty and that independence which may be at once the means and the incentive to regenerate itself in purity of religious sentiment, in simplicity of manners, in the strictness of discipline which, so greatly to the honor and dignity of the pontificate, made its primitive times glorious and venerated ; . . . with the frank and loyal abandonment of that [temporal] power which is utterly opposed to the grand and wholly spiritual purpose of its institution. . . . The Italian revolution is a great revolution, precisely because it begins a new era. Italy has had this great trust committed to her — to lay the foundations, not only of her own future, but also of that of the whole human race.

A few days later, pursuing the same line of thought in a private letter, — quoting indeed this, his own language to Parliament, — Ricasoli added further that "to reform an institution, the best method is to restore it to its own first principles."

Such was Ricasoli's interpretation of the formula which Cavour had given to Italy : "A free church in a free state." Cavour had very clear ideas of that which alone could make a

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state free. He thoroughly and fully realized that it was freedom both from foreign domination and from domestic autocracy, — that to Italian civil freedom constitutional government was as necessary as the expulsion of the Austrian power. But Cavour never seemed to have advanced so far from the ancient ecclesiastical ideas of his country as to make his reasoning about the church equally clear and logical. He unconsciously accepted the dictum of Pius IX: "*La Chiesa son io,*" and tacitly assumed that release from secular or external control was sufficient to give freedom to the church. The recovery of the church's internal or constitutional liberties was, therefore, no necessary part of his politico-ecclesiastical policy.

Ricasoli seems to have been the first of all Italian statesmen who clearly perceived and fully realized that such freedom as alone could harmonize the Italian church with a free and constitutional Italian state would be freedom from internal as well as from external oppression; that it must be freedom from ecclesiastical autocracy as well as from secular domination; in other words, that the free church of Italy must be a reformed or depapalized Catholic church. But since the attempt to effect such reform by secular constraint and by political pressure would be a violation of its external or civil freedom, he also saw that the state could consistently do no more than set before the church every motive and encouragement to voluntary self-reformation. While, therefore, in his own personal relations with the church, as a private lay member of her communion, he would gladly do whatever he might to hasten a readjustment of her relations to the state, and such internal reforms as he held to be necessary to those relations, yet, in his official and political position, as representing the state in its dealings with the church, Ricasoli consistently resisted every attempt to put political pressure upon the church for those purposes.

His policy in this respect never commended itself generally to the English friends of Italy, who thought it alike the wisdom and the duty of the Italian government to play a vigorous part in constraining the church to such a readjustment and reformation as were demanded by national interests. Ricasoli himself

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was accustomed to say that the ecclesiastical principles of English political philosophy were less helpful to Italy, in this her great problem of problems, than were those which underlay that of the United States. It should be added, however, that the latest judgment of Mr. Gladstone on this issue is said to be in substantial accord with that of Ricasoli; and that the latter came to wonder why the course of American politics so often ran counter to American politico-ecclesiastical principles.

In accordance with the programme enunciated by him on accepting office in 1861, as above stated, Baron Ricasoli addressed to the Pope a letter, accompanied by certain articles proposed as a basis of negotiation. These were not, however, formally submitted to the Pope, for he refused in advance to consider or even to receive them. On the 20th of November of that year, Ricasoli laid before Parliament a statement of the course he had attempted to take. The majority, however, was by no means prepared to concur in such a policy. It was opposed equally by those who sustained the stand taken by the Pope and defended the temporal power, and by those who were too hostile to the church willingly to see the hold of the state upon her in any degree relaxed — least of all while the Pope was so bitterly and obstinately adverse to the new civil and political life of Italy. Nothing, therefore, came of this. Yet there were some who fully appreciated the profound and generous statesmanship of the prime minister, and were able to discern with him the distinction between the Italian Catholic church and the papal and curial government of that church, — the distinction on which alone his statesmanship was based. One deputy declared: "It *is* necessary to go to Rome, but upon the overthrow of papal principles; for otherwise we shall not long remain there." And the eminent jurisconsult Mancini said:

> For the rest, signori, be sure of this: Whether the papacy reconcile itself with Italy or not, these will, in the not distant future, be everywhere the reasonable relations between the church and the state; this is the destiny of human communities. Whether to-day the Pontiff consent or not, Italy will one day come of her own accord to concede to the church this liberty and this freedom of action as an exercise of

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the personal liberty of citizens; although the proposals of the honorable president of the council have for the present only placed Italy in a position to predict, if we may so express ourselves, — to anticipate this great and inevitable reform.

Ricasoli held office at this time less than a year. He was reserved, taciturn, apparently somewhat haughty; at all events, he wholly lacked the popular manners and the political flexibility which are in Italy, as elsewhere, commonly essential to success in public life, and he was therefore fitted for the serious crises of statesmanship, rather than for the management of men and the guidance of government under ordinary conditions. But, in this brief tenure of power, he secured European recognition for that which had thus far been accomplished, and he inaugurated a five years' peace, during which Italy was enabled to organize the results of the two preceding years, and to await the fulness of time for her advance to Venice and Rome.

It was more than two years after the resignation of the first Ricasoli ministry that Minghetti, in 1864, negotiated with the French government the so-called September Convention. In accordance with this, the French troops were to be withdrawn from Rome, where their presence was a standing cause of popular irritation against France, and on the other hand, the seat of the Italian government was to be removed from Turin to Florence and the Pope was guaranteed by Italy against all attack from without. About the same time, Signor Minghetti himself published an able pamphlet, in which he proposed a solution of the Roman question. To the leading principles of this pamphlet reference will be made further on.

The September Convention proved very unpopular, and the Minghetti ministry was forced to resign. La Marmora, who succeeded to the government, at once submitted to Parliament a project of law for the "suppression of the religious orders and for the disposition of the ecclesiastical property." This project, being referred to a parliamentary commission, of which Baron Ricasoli was chairman, was by him reported back on February 7, 1865, but so greatly modified that it was now rather the baron's project than that of the ministry. While

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this was under discussion in Parliament and without, the Pope expressed a wish to confer with some representative of the Italian government in reference to the many vacant episcopal sees in Italy, which, as the law then stood, could not be filled without the concurrent action of the Pope and the King. The project and the report on it were therefore withdrawn, and Signor Vegezzi was sent as a commissioner to Rome. From this, however, nothing practical resulted beyond the arrest of the discussion in Parliament; and such, not improbably, was the real object of the papal court in asking a conference.

Under these circumstances, Ricasoli on July 11, 1865, published a profession of his political principles, which may be taken as the accepted platform of that portion of the *Moderati* which looked to him as their leader.

> What [he asked] are to be the important articles of our creed? In the *political* order, the monarchy and the constitution, and in these, the completion of the national unity. In the *administrative* order, decentralization, liberty, everywhere.
>
> The monarchy has, among us, been the author and the promoter of liberty and of independence, the fulcrum of the development of the national destinies, the bond of union between Italian peoples divided for ages. Reason and sentiment alike draw us to this form of government and secure our devotion to it. The constitution is the foundation of our public rights, the basis of our liberties. . . . Decentralization ought to consist in calling the citizens to administer public affairs as largely as possible; and this will be accomplished by giving to the commune and to the province the largest local autonomy which is consistent with the unity of the state and the necessary authority of the government. . . .
>
> This, as respects general principles. We cannot, however, forget that we have two special questions which it is impossible to put aside and the solution of which depends in great part on a wise internal policy: the question of Venice and the question of Rome.
>
> The question of Venice is simple; . . . to the authorities of the state must be freely intrusted the selection of the time and of the means.
>
> More complex — far more complex — is that of Rome. The convention of the 15th of September simplifies it to a certain point, since it fixes a limit to the occupation [of that city] by arms which, although allied and indeed friendly to Italy, are yet foreign. Italy, it is needless to say, must respect that convention and scrupulously execute it. . . .

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Since the convention, it is no longer Italy which must go to Rome, but Rome which must come to Italy. The political problem, however, is in Rome complicated with the religious problem; and it would be vain to hope that the one can be truly solved without a true solution of the other.

When I call it a religious question, I use a common expression which is perhaps not exact; for it is not the interests of religion that are involved, but rather those of the curia and of the clerical body. The Italians are and will remain Catholics. They wish to respect and to have respected the liberty and the dignity of the church and of the clergy, and of the Roman head of the church and the clergy: but they do not wish to give to the Pope and to the clergy a liberty of privilege which is converted into aggression and into war upon the nation. Now I believe that the time has come to put an end to this conflict of ages between the state and the church, . . . nor other way do I see to accomplish this than by separating state and church. . . .

On the 4th of November, 1865, the French troops were withdrawn from Rome, and the Roman question was so far disembarrassed until the re-occupation of that city in 1867, in consequence of the violation of the September Convention by Garibaldi. Two weeks after the evacuation the Italian Parliament met for the first time in Florence, now the capital. In the opening speech from the throne, Victor Emmanuel referred to the "negotiations with the pontifical see" which some months before had been undertaken by the government, but which "had been cut short when they were found to militate against the rights of the crown and of the nation." These words were greeted with a storm of almost universal applause, which was scarcely less general when the King added: "The Italian people must disembarrass themselves of those traditions of the past which arrest the perfect development of their new life. You will, therefore, have to consider proposals for the segregation of the church from the state and for the suppression of the religious orders." This word "segregation" had been carefully chosen, rather than "separation," to indicate a policy less radical than that which had been proposed by Ricasoli. Those interests which were only segregated would not be wholly relieved from all secular or governmental control.

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In accordance with this programme, the La Marmora ministry now brought before Parliament the so-called Sella-Cortese project of law, the partial acceptance of which wrought the suppression of the monastic corporations of the religious orders. More than this, however, was not accomplished at this stage of affairs. The time for national advance had now come again. La Marmora, having concluded an alliance with Prussia for war against Austria, resigned office to take command of the armies of Italy, and Baron Ricasoli was called the second time, in June, 1866, to the charge of the government.

This war resulted in the freedom of Venetia and its union with the Italian kingdom. But for this Italy was more indebted to diplomacy than to arms. The Italian forces had been unsuccessful alike on land and on sea, and Venetia was ceded by Austria, not to Italy, but to France. Napoleon sought to detach Italy from the Prussian alliance by offering, on the one hand, Venetia as the purchase price of that withdrawal; and by threatening, on the other, to summon the *Corps Legislatif* and to lay before it a project of an alliance between France and Austria. In the spirit of another Tuscan's famous reply to the French Charles VIII, Ricasoli peremptorily refused to violate the good faith of Italy. "Should the Emperor convoke the *Corps Legislatif*," replied he, "we will convoke Parliament." Napoleon knew with whom he was dealing. He remembered 1860 and he shrank from an issue with such a man. The honor of Italy was maintained; but Venetia was none the less ceded to her. The revolution was thus completed at the north, and Rome alone remained to be redeemed.

Strengthened by the success in the one case, Ricasoli now addressed himself to the far more difficult and complex question. Never had Italy more confidence in "*il fiero Barone*" than now; and never, it would have seemed, was he better able to carry Parliament and the nation with him in a policy of wise conciliation and reform. In Ricasoli's own subsequent language, his first measures were prompted by a desire

to facilitate the solution of the Roman question, by frankly separating the political issue from that of religion, and by disembarrassing the

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former of the latter, — being careful that, in no degree nor under any pretext, should the question of Rome lose its character of an internal issue, and that no attribute of internationality should in anywise be impressed upon it.

He first, therefore, by a circular of October 22, 1866, recalled to their respective sees the bishops who either had themselves abandoned them or had been exiled on account of their hostility to the national movement. Sixteen only, who had taken up their residence in Rome, were excepted, but permission to return was extended to these in November. The ground of this concession was expressly stated: that, since the acquisition of Venice, the Italian kingdom was now established on such a firm basis that their hostility could be disregarded; and that, moreover, the bishops equally with all others were responsible to the laws which were now the sufficient guarantee of the public peace. On the very day upon which it was decided to extend this concession to the bishops in Rome, they addressed to the prime minister from Rome a protest against their exclusion, attempting at the same time to draw an unfavorable contrast between the conditions in which the church was then placed in Italy, and those under which the Roman Catholic bishops of the United States had lately held a synod in Baltimore. Ricasoli replied, congratulating them upon their admiration for American laws and for the principles of religious liberty.

This recall of the bishops was followed, at the Pope's request, by sending to Rome the Commendatore Tonello, to resume the negotiations of the Vegezzi mission of the preceding year, touching certain purely ecclesiastical matters in which the Italian kingdom was concerned, and especially in reference to the appointment of bishops to the vacant sees, of which there were now as many as eighty. The chief difficulty in the way of such appointments was that by any formally concurrent appointment — save only in the case of the vacant Sardinian sees — the Pope would give an official recognition to the results of the Italian revolution, and to Victor Emmanuel as King of Italy. The instructions given to Signor Tonello, and his

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correspondence with the minister of Grace and Justice, fully sustain the language in which Ricasoli characterized his policy. To cite a sentence:

> Your mission limits itself, in effect, to persuading the Holy Father to recognize the fact that the Italian church will meet no obstacle in its spiritual action within the Kingdom of Italy, whose new institutions and laws do not differ from those of other states which have a Catholic majority of the population, save in the larger liberties which the church enjoys here.

At the same time, while the ministry pressed upon the Pope the fact that the clergy were originally chosen for their respective charges, and the bishops for their several sees, by those over whom they were to be placed, — a custom to which the Pope was warmly urged to return, — twenty of the eighty vacant Italian sees were nevertheless filled by mutual agreement between the civil and the ecclesiastical government, in accordance with existing laws.

During the continuance of these negotiations, *i.e.* on January 17, 1867, Signori Borgatti and Scialoia, the ministers of Grace and Justice and of Finance, respectively, laid before Parliament, on behalf of the Ricasoli ministry, the project of a law "for the liberty of the church and for the disposition of the ecclesiastical property." This project, the recall of the bishops to their sees and the Tonello mission were severally parts of one politico-ecclesiastical policy, for which Baron Ricasoli, on a subsequent occasion, personally accepted the responsibility. Yet even these measures fell short, in some important respects, of that policy as he had two years before submitted it to the judgment of Italy, and as he would now have again pressed it upon Parliament, had he not deemed it hopeless to do so.

Three distinct schemes had now been brought forward, — by the La Marmora ministry, by Ricasoli and by Minghetti, respectively, — for defining and settling the future relations between the Italian church and state and for the disposition of ecclesiastical property. All alike proposed to terminate the existing imbroglio and to adjust the complicated relations of church and

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state by a severance of the ecclesiastical interests of the one from the purely political interests of the other. Ricasoli and Minghetti both proposed such a complete *separation* as would leave no immediate official relations between them. The La Marmora project, on the contrary, had proposed rather a *segregation*, by which was apparently intended the retention of certain official relations with the church, which were to be administered, however, as an interest wholly distinct and apart from those of secular politics. All three plans designed, moreover, to take from the church and put into the hands of the state the great landed property which the former held in mortmain, — in Sicily, for instance, as much as one-third of the island, — and so to restore to productive uses enormous tracts of land remaining unimproved and lying comparatively idle in the possession of ecclesiastical corporations. They all required that such real estate and such property generally as was not actually devoted to religious uses (excepting thus churches, ecclesiastical residences and adjoining gardens, seminaries, libraries, *etc.*) should be sold, — a certain portion of the proceeds to be surrendered to the state and the remainder to be converted into government securities. The total annual income of such property was estimated by Minghetti at some ninety millions of lire, or about eighteen millions of dollars. It was in the disposition of that portion of these revenues which was to be left to ecclesiastical uses that the three schemes most widely differed.

The La Marmora project proposed that the state should retain these securities or their revenues in trust, thus keeping control of them, while yet administering them for the benefit of the church. It involved a great reduction in the number of bishoprics,[1] canonries, *etc.*, and the total suppression of the religious orders, but provided on the other hand for the salaries of such ecclesiastical dignitaries as should continue to be recognized by the state, as well as for the pensions of the members of the suppressed orders.

Minghetti proposed that one-third of the proceeds of the lands should go to the state, the other two-thirds being handed

[1] From 235 to 69.

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over to the existing ecclesiastical authorities to be used or disposed of by them at their own discretion.

Ricasoli concurred with La Marmora so far as concerned the suppression of the religious orders and the great reduction in the number of bishoprics and of other diocesan or cathedral dignities. But for all questions of church property and of financial administration, he had proposed to call in the lay element. He had proposed to constitute parochial and diocesan corporations, — the one to be chosen by the male Catholics of the parish over thirty years of age; the other, by the clergy and the representatives of the diocesan laity. To these corporations severally he had proposed that the state should pay over the securities destined for support of the churches, bishops, clergy, *etc.*, in their respective parishes and dioceses. Indeed, Ricasoli further proposed to entrust the nomination of parish priests to the parochial boards, and that of bishops to the diocesan boards, saving, in either case, the respective rights of their ecclesiastical superiors.

This recovery of the lay element — this committal of the secular and financial interests of the church to those only who represented alike the clergy and the laity, and this recognition of the church as so represented, rather than as constituted in the persons of the Pope and cardinals of a politico-ecclesiastical close corporation possessing no claim to a representative character, — these were features peculiar to Ricasoli's policy. These were the distinctive characteristics of that policy as laid before Parliament by him in January, 1865, when reporting on the Sella-Cortese project, and as widely discussed at that time by the Italian press.[1] Ricasoli had not then been able to commend this part of his report successfully either to Parliament or to the press; he did not, therefore, deem it wise to burden with these provisions the project of law laid by his ministry before Parliament in January, 1867. He held the more advanced and char-

[1] It will be noted that the La Marmora and Minghetti projects were both conformed in principle to French precedents; that of Ricasoli — especially as reported in 1865 — was much more nearly allied to American laws and customs respecting the church.

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acteristic features of his policy in reserve for a more propitious occasion, and contented himself for the time being with such as would probably arouse least opposition.

The leading provisions of the so-called Borgatti-Scialoia project now submitted by the second Ricasoli ministry were as follows: The measure was, in the first place, frankly entitled a project of law "for the liberty of the church" as well as "for the disposition of ecclesiastical property." As to the *freedom of the church*, the scheme provided: that the "Catholic Church of the Kingdom" should be free from all state interference in respect to its worship or to the management of its internal affairs and self-government; that no official recognition of ecclesiastical appointments or oath of allegiance or royal *exequatur* and *placet* should any longer be required, nor should any political privileges or immunities be thereafter accorded to that church; that the canons, laws and established customs of that church should no longer have the force of laws, save so far only as they could be equitably held to constitute conditions in voluntary contracts, and so far also as they should be consistent with the laws of the state; and that the church, holding and administering her own property and depending for support upon this, together with such further provision as might be voluntarily made by her own adherents, should have no claim for such support upon the state. As to the *disposition of ecclesiastical property*, it was provided: that all cathedrals, churches, ecclesiastical residences, seminaries, grounds and gardens, libraries, monuments, statues and pictures, in use or in possession of the church, should be exempt from alienation; that all hospitals, schools and property belonging thereto should be secured to the communes in which they were found, in trust for the same purposes; that all other ecclesiastical lands and estates, real or personal property, rents and revenues, whether actually in the possession of the church or in that of the state, including the property of the lately suppressed religious orders already in the hands of the government, should be sold and the proceeds thereof converted into government securities, within the period of ten years; that the gross amount of these securities should

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be divided between the church and the state in the general proportion of two-thirds to the former and one-third to the latter; that, estimating the probable gross value at eighteen hundred millions of lire (about $360,000,000), if the bishops would themselves undertake the conversion of this property into such securities, this should be permitted to them, on condition of paying to the government the sum of fifty millions of lire ($10,000,000) semi-annually for six years; or, if the government should charge itself with this conversion, with all the risks and expenses thereof, it should pay over to the church — one-half to the bishops and one-half for the expenses of worship — securities to the value of fifty millions of lire annual income; that from the portion coming to the state, provision should be made for pensioning the surviving members of the suppressed religious corporations, — the state retaining the remainder on the ground that the government would now be charged with many educational and charitable interests for which, among other things, the church had, in other times, received this property.

It is to be noted that in this project the Pope and the ecclesiastical authorities of Rome, in their extra-diocesan relations, are not so much as once named or referred to. The whole question of the extra-diocesan functions of the bishop of Rome and his relations to the church at large, is tacitly treated as one with which the state as such has nothing to do. The subject is regarded as one between the Italian government and the Catholic church of the Italian provinces, as represented by the bishops of that church, each for his own diocese. Indeed, it was a logical consequence of Ricasoli's politico-ecclesiastical philosophy, that the state could not enter officially into the question of the extent to which the authority of the bishop of Rome had been or should be carried beyond his diocese; this question lay wholly between that dignitary and the church, whether in Italy or in other lands. It is also especially to be noted that, in the language of an Italian editor,

> the liberty in accordance with which it was proposed to regulate the relations between the Catholic communion and the state, was not a con-

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cession for which a corresponding advantage could be asked, but the logical and the necessary application of a principle, equally appropriate to the relations of the state with other religious confessions.

The Italian Parliament had not been ready to sustain Ricasoli's proposed bases of agreement with the papacy in 1861. It had not been at all prepared to concur in the amendments which, in 1865, he proposed to the La Marmora project. So too in 1867, it was not sufficiently advanced in the true conception of religious liberty to accept even the modified, but still wise and generous policy which was urged upon it by the most enlightened and prescient Italian statesman of his day. The discussion of the project did not really advance beyond the first title. Those who would not consent to any release of the church from secular restraints, and those who, agreeing to such release, were yet unwilling to treat her so generously and with such fearless confidence in the regenerating power of liberal institutions, — both united with those who, in hostility to all such dealings with the church and papacy, opposed the project on principle and *in limine*. Ricasoli, in consequence, dissolved Parliament and frankly appealed to the country. A new Parliament assembled on March 22. The discussion upon the proposed "Law for the liberty of the church" was resumed almost at once; but a decided majority was still adverse to what were held to be perilous concessions, and early in April the Ricasoli ministry resigned. The Commendatore Ratazzi, leader of the so-called Left, the party most radically hostile to the church, was thereupon called to take the reins of government. It was on the ground that he was too generous to the church and that he was, in that generosity, disarming the state in her bitterest struggle for liberal institutions and nationality, that Baron Ricasoli was defeated. In July following, the proposed policy of the Ricasoli ministry was made the subject of a searching and hostile discussion, on which occasion the official correspondence of the Tonello mission was published. In the course of this debate, the baron said:

Signori, you may indeed condemn me; but, beware lest future facts

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should prove me right. Above us is another court, that of public opinion: and then, even should this fail, there is the consciousness of having done one's duty.

Ricasoli never again accepted the government, although his counsel was frequently sought, especially in any serious issue, alike by the King and by the ministry for the time being. It was once said of him, that save in a great emergency, he could not be expected to undertake the heavy cares of leadership. He refused even a seat in the Senate of Italy. To the day of his death in 1880, however, he was unfailingly returned to Parliament by his own constituency — much as in the case of John Quincy Adams, whom, in singleness of character, in unbending moral courage and in political integrity, he greatly resembled. He was always in his seat; he closely watched every debate; he rarely spoke, but when he did so, he commanded the most reverent attention.

After the occupation of Rome by the Italian army, in 1870, and before the removal of the seat of government from Florence, Parliament was called on by the Lanza ministry, then in power, to consider a project of that "Law of the Papal Guarantees" which was intended to place upon a definitive footing the relations of church and state in Italy, as well as to secure to the Sovereign Pontiff that independence, on the ground of which alone Europe could be expected to acquiesce in his loss of temporal power. This project was what might have been expected of a government which regarded the papacy, the church and even Christianity itself solely as elements in a political problem; and whose attention, moreover, was at the time drawn far more to the diplomatic Scylla than to the ecclesiastical Charybdis. They offered the Pope and the papacy dignities, privileges and immunities which left the Catholic governments of Europe nothing to desire for the papacy, so far as their own interests were involved, whatever they may have left Italy to desire for her own.

The leading provisions of this remarkable law were these: As to the Pontiff, his person was declared sacred and inviolable, and sovereign honors were accorded to him throughout the

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kingdom; he was authorized to retain the guards of his palace; the sum of 3,225,000 lire annually was assigned to him as a charge on the public debt, this being the estimated income of which he was deprived by the loss of the temporal power, and this was declared exempt from taxation; the Vatican palace (to which was afterward added the Lateran), with the museums, libraries, gardens, *etc.*, Santa Maria Maggiore and Castel Gandolfo on the Alban Hills were assigned to him, and these or any temporary residence of the Pope, as well as the seat of the sacred conclave when assembled to elect a Pope, were to enjoy entire immunity from civil jurisdiction, and freedom from official visitation. The right to publish all bulls, briefs and other decrees whatever, either in the established way, by affixing them to the gates of the basilicas, or otherwise, was assured to him; the cardinals and other officials were to enjoy entire immunity in the discharge of their ecclesiastical duties; the Pope was permitted to have his own post and telegraph offices, and his legates and the representatives of other powers accredited to him were to enjoy the usual diplomatic rights and privileges. So much as regards the papacy. As regards the church, all ecclesiastical acts throughout the kingdom were to be exempt from civil interference; the *appello ab abuso* was repealed, but, at the same time, the use of the secular power to sustain or execute any such acts was wholly forbidden; all ecclesiastical meetings were to be free, without the necessity of asking permission from the government; all ecclesiastical nominations to be made without government interference; oaths of allegiance to the crown no longer to be required of the bishops; the royal *exequatur* and *placet* to be abolished; and all ecclesiastical institutions at Rome to be free from the interference of the secular authority.

In this project, from the nature of the case, the papacy necessarily appeared in the forefront, as it had not in those before submitted to Parliament. This project, moreover, did not attempt any "disposition of the ecclesiastical property." But, save in these two respects, it will be readily seen that the plan was largely an acceptance of the principles first enunciated by Ricasoli in 1860 and 1861, and even of those set forth

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in his project of 1867, — in certain particulars, indeed, inclining rather to the Minghetti policy, inasmuch as it would turn over the control heretofore exercised by the state to the hands of the existing ecclesiastical authorities.

An important amendment in this project, which was proposed in committee and adopted, was that which divided the law into two distinct titles, — the one relating to the "Prerogatives of the Supreme Pontiff and of the Holy See," and the other, to the "Relations of the Church with the State." This amendment more strongly marked the distinction between the papacy and the church — a distinction which was an essential feature of Ricasoli's politico-ecclesiastical philosophy. It was when the second title was under discussion that Ricasoli made a last attempt to secure recognition for his favorite idea — that the laity should have a share in the care of the church's secular interests. A considerable party of *Moderati*, seventy-nine in all, including some of the truest patriots and clearest-headed statesmen in Parliament, under the lead of the baron, brought forward what were known as the Peruzzi-Ricasoli amendments, which aimed to call into existence, as in the project of 1865, lay and other representative bodies to whose hands the power of the purse should be entrusted. These amendments did not, indeed, prevail; and all that was then and there accomplished in that direction was an explicit reservation to the state of the future power to make such a provision. But this was much — especially in view of the fact that the discussion of these proposed amendments, in Parliament and in the public press, was of a most thorough and morally effective kind.

This law of the Papal Guarantees was accepted by Europe, and it has been loyally obeyed by the Italian government ever since; but it has been practically defeated by the authorities of the Vatican. So far as it is to be considered an understanding with Europe, it is probably still binding; but so far as it is to be regarded as a treaty with the papacy, it has surely been rendered null and void. Many an Italian publicist has been led by the course of after-events to realize that Ricasoli was the one statesman of the Italian revolution who understood the

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true relations of church and state in Italy — who most profoundly appreciated, in some of the most serious problems which this age has inherited from the past, the solvent power of law-reverencing liberty.

In the spring of 1873, in a parliamentary crisis which, at the time, seemed to jeopardize the government and possibly the monarchy, Ricasoli rose in his place and, applying his principles to the one issue then before them — the question of the monastic corporations in Rome — lifted the whole subject to such an elevated plane of justice and generosity and faith in law and liberty, that he commanded the support of the better elements of every party and carried all before him. The King drove to his villa the next day to thank him; and the far-seeing statesman had a foretaste then of that future in whose coming he often expressed, in private, an unwavering confidence, when church and state should be co-ordinated only by a mutual trust, — when the church should find its best secular guarantees in the righteous laws of a Christian state, and the state its noblest inspiration in the patriotism and righteous influence of a Christian church.

Wm. Chauncy Langdon.

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BOOTH'S EAST LONDON.[1]

THIS is by far the most important English contribution to economics since the publication of Toynbee's lectures in 1884. The two books have much in common; both illustrate the new interest that is beginning to show itself in the direct study of the actual facts of social life. They differ, indeed, in method. Toynbee's work was the first attempt in England to trace the historical origin of existing conditions, while the aim of Mr. Booth's book is to obtain, by laborious inquiry, a more accurate description than was previously possessed of the conditions themselves. But the historical method and the method of observation — which from the biological sciences is now passing over into the sociological — are closely allied. Those who pursue them agree in the expectation that from the sequence and coexistence of facts something will be learned of their causal relations.

The first volume of *Life and Labour of the People* is a most admirable performance. There have been earlier essays in a similar direction, *e.g.* the reports of Mr. Leoni Levi; but none of them has been on anything like the same scale, and none has established conclusions of anything like the same solidity and completeness. Mr. Booth has furnished us, not so much with a collection of facts to support this or that theory, as with a great positive addition to our knowledge, far transcending in importance most abstract argumentation.

The book is divided into three parts: "The Classes," "The Trades" and "Special Subjects." Of these the first, by Mr. Booth himself, is by far the most striking. The London school board employs in East London sixty-six "visitors," or attendance officers, who call at every house and draw up lists of children of school age. Each of the visitors has but a few streets under his care; and as most of them have been employed in the same district for several years, they have acquired very complete information as to the condition of the people. From the lips of these officials, Mr. Booth and his secretaries took down a description of almost every house and its inhabitants, — a task whose magnitude we realize when we are told that it dealt with a population of 900,000, living in 3400 streets, and that it occupied the greater part of two years. The data

[1] *Life and Labour of the People.* Vol. I: *East London.* Edited by Charles Booth. Contributors: Charles Booth, Beatrice Potter, David F. Schloss, Ernest Aves, Stephen N. Fox, Jesse Argyle, Clara E. Collet and H. Llewellyn Smith. London, Williams & Norgate, 1889. — 598 pp. With a colored map.

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thus obtained, being corrected and supplemented from other sources, serve as the basis for a division of the population into eight classes, which may be presented as follows:

A. 11,000. 1¼ per cent of the population. *Lowest class of occasional laborers, loafers and semi-criminals.*

This class, though it receives accessions from all the others, is largely hereditary in its character. It is not scattered uniformly over the whole area, but is found in a number of more or less isolated settlements.

B. 100,000. 11¼ per cent. *The very poor*, with casual earnings.

This class is composed chiefly of casual laborers. The adult men, about 24,000 in number, of whom as many as 6000 are sometimes employed at the docks (p. 190), "do not on the average get as much as three days' work a week."

C. 75,000. 8 per cent. } 204,000. 22½ per cent. *The poor*, with weekly
D. 129,000. 14½ per cent. } incomes of 18*s.* to 21*s.*

C. Maintained on *intermittent earnings*, and composed of laborers whose work is necessarily intermittent, with a large contingent from the poorer artisans, the street sellers and the smaller shopkeepers.

D. Maintained on *fairly regular earnings*, and composed chiefly of laborers in permanent employment.

E. 377,000. 42 per cent. *Regular standard earnings* of from 23*s.* to 30*s.* weekly.

This includes the more prosperous laborers, a large proportion of the artisans, the best class of street sellers and general dealers, a large proportion of the small shopkeepers, the best-off among the home manufacturers and some of the small employers.

F. 121,000. 13½ per cent. *Upper working class*, earning above 30*s.* weekly.

This includes foremen over laborers and the more comfortable among the artisans, together with a number of small employers.

G. 34,000. 4 per cent nearly. *Lower middle class.*

Shopkeepers and small employers, clerks and subordinate professional men.

H. 45,000. 5 per cent. *Upper middle class.*

The servant-keeping class. But of these more than two-thirds are to be found in Hackney, the more genteel northern part of East London.

There seems no reason to doubt the substantial accuracy of these figures, and it would be difficult to exaggerate their significance. Perhaps the conclusion most surprising to the general public is the very small number, comparatively, of the loafing and semi-criminal class. "The hordes of barbarians of whom we have heard, who, issuing from their slums, will one day overwhelm modern civilization, do not exist. There are barbarians, but they are a handful, a small and decreasing percentage, — a disgrace but not a danger" (p. 39). Two other conclusions, more cheering than might have been anticipated, are that over

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55 per cent of the working population belong to families receiving each more than 21*s.* a week, and that about 70 per cent can count upon steady employment I cannot help thinking, however, that, in reaction from the usual melodramatic presentation of East London life, Mr. Booth has commented upon his statistical results in a tone somewhat too optimistic. To say, for instance, of the 200,000 "poor," that "they are neither ill-nourished nor ill-clad, according to any standard that can reasonably be used" (p. 131), is probably to create a more comfortable impression in the minds of Mr. Booth's readers than the author wishes to convey. "Poverty" Mr. Booth defines as an average weekly income of from "18*s.* to 21*s.* for a moderate family" (p. 33). But it is noticeable that in the table of household expenditure (p. 138) on which Mr. Booth bases his remarks as to standard of comfort, the average weekly income ascribed to classes C and D is 23*s.* 6*d.* Half a crown a week makes a considerable difference. But even with the additional half-crown, a family must needs be very small to secure adequate food and clothing together with fuel and houseroom in London. Mr. Booth's opinion in this matter may usefully be compared with the estimates of Mrs. Barnett in *Practicable Socialism* (1888).

There is another way in which Mr. Booth has unintentionally supplied a sedative to the troubled consciences of some of his readers, and that is by his language in reference to class B: "It is doubtful if many of them could or would work full time for long together if they had the opportunity . . . The ideal of such persons is to work when they like and play when they like; these it is who are rightly called the 'leisure class' amongst the poor" (p. 45). It is not surprising that people are beginning to say: "The distress of the very poor is their own fault. Mr. Booth has proved that they don't want to work." But surely this is to disregard the fact that such moral qualities as shiftlessness and idleness are themselves to a large extent not ultimate facts, but the product of circumstances. It is indeed a defect running through the whole book now before us, that it confines itself too narrowly to the individualist point of view; it describes the condition of the individual and the consequences which flow from it, without attempting to penetrate any further. So in this case. In every class there are doubtless many who fall to a lower social position from sheer incapacity or laziness, and there is nothing more to be said. Of such, class B is doubtless to a large extent composed. But the faults of the class as a whole are certainly in part the result of the character of modern industry. Take for instance the docks, — and what is true of the docks is true *mutatis mutandis* of several employments of unskilled labor: "Twenty years ago a man could be sure of fairly regular employment, say for ten months out of the

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twelve, and for nine to ten hours a day, and was accustomed to earn on an average *20s.* to *25s.* a week."[1] Then came the introduction of steam navigation and the ever-increasing rapidity of commercial operations; and the sons of the regularly employed men of 1869 became the incompetent loafers of 1889 as directly as if the companies had designed it. This mental result of material conditions is recognized by Miss Potter in her paper on the docks: "The casual by misfortune tends to become the casual by inclination. The victims of irregular trade and of employment given without reference to character are slowly but surely transformed into the sinners of East-end society" (p. 201). It is a pity that such considerations as these are not put forward more prominently in Mr. Booth's description of the classes.

Part II, "The Trades," is made up of six chapters on the chief branches of employment, together with a chapter on "Women's Work." Each is the result of careful investigation, and one or two spring from personal experience. No such thorough and systematic studies of industrial conditions have ever before been made in England, and they deserve the most careful attention. I must however limit myself in this place to a brief account of their contents. The first, Miss Potter's chapter on "The Docks," is written in a more popular style than the rest, but is also less complete. It gives a clear enough picture of the conditions of labor before the great strike; but it dwells too much on the surface. Without suspecting it, Miss Potter gives us only one view of the situation, that of the dock officials, from whom her information was obtained. According to this view, affairs were in a hopeless *impasse*, and nobody in particular was to blame for anything: the "uncontrolled competition of metropolitan industry" led London shipowners and merchants to play off docks and wharves against one another, while at the same time the volume of business at the port of London was decreasing. As to diminishing the irregularity of employment, — the chief evil, so far as the dockers were concerned, — that was impossible. Had it been possible it would have been attempted: "I think we may rest assured that if a practical plan were suggested by which this might be effected, the employer would be the first to take advantage of it; for the loss entailed by the bad work of the casual is a fact unpleasantly realized in the balance sheet" (p. 205). This simply means that by the continuance of the system of casual employment the directors thought that they got their labor more cheaply, and certainly saved themselves a good deal of trouble; but they did not at all realize that their action was immoral. Before many months had

[1] The London *Times*, August 29, 1889, p. 8: a summary of the evidence before the House of Lords Sweating Committee.

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passed, however, we find the *Times* writing thus in its leading article of August 31, 1889:

> It is all very well for the directors to plead that there is an enormous surplus of such labour, and that the men they employ are at least better off than if they had no employment at all. But the fact remains that *they have encouraged the growth of this wretched and shiftless class* by their daily distribution haphazard of an uncertain quantity of employment, and that *the relations established between them and these casual labourers are of a thoroughly demoralizing and inhuman kind.*

The *Times* is neither more moral nor more sympathetic than the average common-sense middle-class Englishman; it represents his opinions only too faithfully. The fact is that the strike forced the general public for the first time to look closely at the conditions of dock labor, and the moral sense of the community declared that, come what might to dividends or trade, such a state of things could not be allowed to continue. This was a lesson which the dock directors, when they gave Miss Potter their account of the situation, had yet to learn.

The chapter needs supplementing in several ways before it can be regarded as an adequate survey of the problem. For instance, it was declared at the time of the strike, upon the high authority of Mr. Thomas Sutherland, M.P., the chairman of the P. and O. company, that "probably one-half of the capital outlay of the London and St. Catherine Dock, and East and West India Dock Company may be considered obsolete for all practical purposes," and that it was upon this capital, sunk on obsolete arrangements, that the directors were trying to earn profits.[1] This of course did not make it any better for existing shareholders, many of whom had acquired their stock recently, but it needs to be mentioned before we can understand what "making no profit" really means. Again, it would have been worth while to have laid more stress upon the part played by excessive competition in reducing the profits of the two great dock companies. The rivalry between the London and St. Catherine company and the East and West India company; the time of high profits before and after the opening of the Suez canal; the construction by the former company of the Victoria and Albert docks, and by the latter of the Tilbury docks; cut-throat competition and the disappearance of profits; — this is a sequence of events which would have shown itself sooner or later even if the volume of trade had not diminished. It contains in it no factor peculiar to the docks: it does but illustrate a danger common to all forms of permanent investment under modern conditions. First high profits; then specula-

[1] *Cf.* the London *Spectator* for August 31, 1889, p. 260, foot-note.

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tive investment; then an excessive supply of the particular service or commodity; and then reckless competition to obtain business on any terms. In America we have become familiar enough with the result of such competition in the shape of railroad discriminations. And like American railroads, the London docks also are beginning to find that safety lies in combination. Since 1888 the two great companies have, I understand, been working under a joint committee, have been able in consequence to raise their rates and have obtained a profit.

The next chapter, on "The Tailoring Trade," is also by Miss Potter, but gives the impression of a more thorough study of the subject. The leading characteristic of the industry is thus summed up:

> We have here a new province of production, inhabited by a peculiar people, working under a new system, with new instruments, and yet separated by a narrow and constantly shifting boundary from the sphere of employment of an old-established native industry. On the one side of this line we find the Jewish contractor with his highly organized staff of fixers, basters, machinists, button-hole hands and pressers, turning out coats by the score, together with a mass of English women, unorganized and unregulated, engaged in the lower sections of the trade; whilst on the other side of the boundary, we see an army of skilled English tradesmen [artisans] with regulated pay and restricted hours, working on the traditional lines of one man one garment [p. 209].

The English workman makes hand-sewn garments for the better shops, which supply customers ready to pay a good price for a good article; the Jewish contractor, machine-made "balloons," chiefly for the supply of wholesale houses with cheap ready-made clothing. So far as East London is concerned, it is this "ready-made" or cheap "bespoke" trade, in the hands of a compact Jewish community resident mainly in Whitechapel, that we have chiefly to consider. There are 901 workshops, of which 685 employ less than 10 hands, 201 from 10 to 25, and only 15 over 25. Most of the shops are overcrowded and insanitary; and at busy seasons the hours of labor are excessively long. But there is little or no "sweating" as it is commonly understood, *viz.* the squeezing of profit out of the actual worker by an idle middleman. The middleman, as distinct from the wholesale house on the one side and the labor-contractor on the other, has disappeared. In the vast majority of the shops, the contractor, or employer, works fully as hard as his employees, his standard of living is practically the same, while his profits are precarious and seldom greater than a fair reward for the labor of organization. As to the 15 shops employing more than 25 persons, here the contractor does probably make a very fair income.

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But on the other hand the condition of his workpeople is better: the workshop is more healthy and comfortable, partly because he can afford to engage special premises for the work, partly because it comes under the supervision of the factory inspectors; and employment is more steady. The great evil of the situation is just the opposite: it is the ease with which men can set up as independent masters, and the consequent multiplication of small shops. The work of these shops is the manufacture of coats. In the manufacture of cheap trousers and waistcoats there is another set of conditions. Here the competition is between the labor of gentile women, the wives and daughters of irregularly employed laborers, — the vast majority of them working in their own homes for wholesale houses or distributing contractors, — on the one side, and on the other, provincial factories, also chiefly employing women. The distributing contractor here also is disappearing; and the miserable wage of the women in East London is due largely to the competition of the factory where the conditions of life are certainly far higher.

"Bootmaking," by Mr. Schloss, and "The Furniture Trade," by Mr. Aves, are two of the longest papers in the volume, and in each case the manufacture is so subdivided, that it is well nigh impossible to give a brief summary of the chapter. In the first of these trades hand-sewn boots made to order occupy somewhat the same position as the better class of coats among tailors; while machine-sewn ready-made boots correspond to the "balloons." In the latter field it is as easy as in tailoring to set up as a small contractor employing half a dozen hands, though here the contractor does not undertake the whole manufacture, but only a branch of it, such as the making of uppers (the contractors and employees in this case being generally women), the lasting or the finishing (chiefly in the hands of Jews). In the last two branches, the "team-system" — an extreme application of the principle of division of labor — has been introduced during the last few years. It is thus described by Mr. Schloss:

> A series of operations, formerly entrusted collectively to a single artisan, is split up in such a manner that one part of the work — that which requires the greatest degree of skill — is performed by a workman who, possessing a relatively high degree of ability, is fairly able to insist upon an adequate remuneration, while the remainder of the work is placed in the hands of men whose greatly inferior competence in their craft forces them to accept a much lower rate of wages [p. 270].

Readers of Mill may remember with what respect Mr. Babbage is quoted as having pointed out "an advantage derived from division of labor not mentioned by Adam Smith," *viz.* the classification of work-

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people according to ability. The effect of this in the boot trade is to substitute for a body of fairly skilled all-round workmen, receiving a tolerable remuneration, a small number of highly skilled men with a relatively high wage, and a great mass of miserably-paid unskilled labor. As newly arrived Jews will accept lower wages and work longer hours than English workmen, another result is that the industry has been largely transferred to foreign hands. Still the master lasters and finishers, with but few exceptions, make no considerable profit. "What the man has to gain by being a sub-contractor instead of a journeyman is chiefly an increased chance of continuous employment" (p. 294). The busy season lasts only from four to six months; and although some few are able to fill up the slack time by alternative employments, "some hundreds of the lasters" (and the same seems to be true of the finishers), "men often of considerable skill in their craft, can for many, and those the bitterest, months of the year obtain little or no employment, and frequently suffer great privations" (p. 268). The furniture trade has much the same general characteristics, — extreme subdivision, and the multiplication of small shops working not for the retailer or private customer but for the wholesale dealer. It also is localized in a small area, chiefly Bethnal Green and Shoreditch. In marked contrast to the prevalent tendency towards the large or factory system of manufacture in most other branches of industry, all the forces in this trade tend to the strengthening of a system of manufacture so small that it may often be called domestic. This development is encouraged by the growth of sawmills tenanted largely by small sawyers and turners "to the trade," and by the creation during the last thirty years of a conveniently near market in the warehouses of Curtain Road. The level of comfort and wages, however, is considerably higher than in the tailoring and bootmaking trades, owing to the greater skill required and to the greater steadiness of employment, which is affected but little by the seasons. Many of the better men earn as much as they did fifteen years ago, and as there has been a considerable fall in prices, their earnings go further; but they certainly have to work at a greater pressure.

Mr. Fox's chapter on "Tobacco Workers" is more cheerful, revealing to us as it does a labor market where fairly good wages are obtained. This seems to be due, primarily, to the circumstance that all the work of the trade (with the exception of a small part of the cigarette making) is necessarily carried on in factories. This, again, is accounted for by the fact that the annual excise license and other excise regulations make necessary a certain amount of capital, "ranging probably from £50 to £60," before setting up in business. An additional reason is that the manufacture of tobacco requires heavy and expensive machinery. The

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domestic workshop, the chief difficulty in the three preceding trades, cannot make its appearance. The factory system, bringing the operatives together in considerable numbers, has facilitated the formation of strong trades unions, which have been able to keep up wages; and it has also facilitated government inspection as to sanitation and hours of labor. The excise tax, often supposed to be an evil, in that it prevents a man from "rising in life" and becoming a master on his own account, is shown to be a blessing, precisely for that very reason. Mr. Fox seems to think that the only persons who have to complain at present are the manufacturers, who are played off one against another by the retail dealers; and he suggests that they should follow the example of their men and organize. Even that grievous thing, a "combine," may have a good side.

Passing over the small group of silk operatives, numbering in all some 1674 (of whom 1260 are weavers), residing in Spitalfield, and employed chiefly in the manufacture of silk for neckties and scarfs, we come to Miss Clara Collet's chapter on "Women's Work." This deals with the making of shirts, ties, trimmings, umbrellas, corsets and stays; with furriers (employed largely by small "chamber masters"), the making of boxes, match boxes ("the last resort of the destitute, or the first occupation of little girls expected to make themselves useful between school hours"), brushes, matches and confectionery, and with a few minor industries. Miss Collet has succeeded in saying much that seems to be both new and true on a somewhat hackneyed subject. She remarks, for instance, that where a trade is irregular, the employment of outdoor hands has at least this good result, that it enables the employer to keep a small indoor staff permanently employed. Irregularity in the employment of married women who work at home is at least a lesser evil than irregularity in the employment of girls. It is a striking fact, again, that among factory workers there is a general uniformity of wage, although the match girls and jam girls have neither to exercise so great skill nor to work so hard as capmakers and bookbinders. The explanation is that the former, with many others employed in such rough work as ropemaking and the like, come from a lower class and earn their own livelihood; the latter, with those employed in other genteel occupations, are the daughters of clerks or upper-class artisans, living with their parents and competing with one another only to procure dress and luxuries.

It will be convenient to postpone for a moment Mr. Booth's chapter on "Sweating," which opens Part III, and look next at Mr. Llewellyn Smith's chapter on "Influx of Population." This provides a much-needed corrective for the vague ideas that were prevalent as to the connection

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between East-end conditions and the "attraction of population" from the rural districts. Mr. Smith shows that the percentage of the population of East London and Hackney born outside of London is actually less than the percentage for the whole of London; for while in London as a whole only 629 out of every 1000 are natives of the metropolis, in East London the numbers are 720 out of 1000. It must be observed, however, that these figures do not give an entirely adequate representation of the migration from outside; they have to be compared with this further fact, mentioned by Mr. Smith, that among *adult male* inhabitants only some 46 or 47 out of 100 were born in London itself. Mr. Smith however reassures us with regard to one field of employment, at any rate, in which country labor was supposed to play an important part, — the docks. He shows good reason to believe that there is now but little movement in that direction: thus, out of 514 of the more regularly employed casuals in the West India dock, 361 were born in London; and of the 153 outsiders, only 17 had resided in London less than ten years (3 less than 5, and 1 less than 1). It is to be regretted, I think, that with these very important conclusions to present, Mr. Smith, and still more Mr. Booth, should have weakened the force of their argument by a too evident desire to take a cheerful view of the situation. This has led to some very inconclusive statistical reasoning. Mr. Smith (p. 505), and Mr. Booth, following him (p. 555), estimate the gain in population due to immigration by (1) taking the excess of births over deaths during the decennial period, 1871–1881, (2) treating that as "the natural growth" of the population at the beginning of the period, (3) adding "the natural growth" to the population in 1871, and then (4) subtracting this total from the population of 1881. The result is called the "net-influx"; and by this process it is brought down to some 10,000 a year. But this includes, as part of the natural growth of the population of 1871, the children born to the immigrants to London during the next ten years; and, as the great majority of immigrants are adult, in many cases young men who marry within three or four years of their arrival, this is a not unimportant consideration. But, not content with minimizing the inflow, in more than one place our authors seem inclined to maintain that it is actually *balanced* by an outflow! Thus, after mentioning the figures before cited as to the number of persons born outside of London, Mr. Smith continues:

> The facts would seem *at first* to be conclusive evidence of a *considerable* inflow of population from other parts [surely it proves at least as much as that]. But a very large part of this admixture of population merely results from *the ordinary ebb and flow of labor*, set up by numberless industrial causes in all parts of the kingdom alike [p. 504].

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Mr. Booth goes still further:

> Influx cannot be completely studied apart from efflux. Population flows out of, as well as into, the great cities, *so that the movement looked at rationally is a circulation* [Mr. Booth's italics], which is not only healthy in itself, but essential to national health. . . . Influx in each case is balanced in large measure by efflux of some kind [pp. 554, 555].

The chief arguments adduced by Mr. Smith are that in the whole of England and Wales only 720 persons out of 1000 were living in the county of their birth, and that in the seven greatest Scotch towns only 524 out of 1000 were natives of the town. But the Scotch case only proves that what is true of London is also true of all great cities; and the other fact is perfectly consistent with an influx to the cities. There is evidently much truth in the proposition that there is an efflux as well as an influx; but stated as it is by our authors, it tends to obscure the significance of one of the most marked of modern tendencies, — a tendency which shows itself in America almost as much as in England, — that towards the increase of the urban at the expense of the rural population.

The concluding paper in the volume is again from the pen of Miss Potter and describes "The Jewish Community." This community numbers in all from 60,000 to 70,000 persons, of whom perhaps 30,000 were actually born abroad and have come to England since 1881. For the present the flood is at an end, though it will probably set in again with any renewal of the *Judenhetze* on the continent of Europe. The newcomers are willing to work as "greeners" for some small labor-contractor in the coat or boot trade; but in most cases they seem to succeed after a time in pulling themselves up into a better position and starting in as small masters themselves. How they manage to do it Miss Potter thus describes:

> It is by competition and by competition alone that the Jew seeks success. But in the case of the foreign Jews, it is a competition unrestricted by the personal dignity of a definite standard of life, and unchecked by the social feelings of class loyalty and trade integrity. The small manufacturer injures the trade through which he rises to the rank of a capitalist by bad and dishonest production. The petty dealer, or small money-lender, . . . suits his wares and his terms to the weakness, the ignorance and the vice of his customers; the mechanic, indifferent to the interest of the class to which he temporarily belongs, and intent only on becoming a small master, acknowledges no limit to the process of underbidding fellow-workers. In short, the foreign Jew totally ignores all social obligations, other than keeping the law of the land, the maintenance of his own family, and the charitable relief of co-religionists [p. 589].

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These evil tendencies are unfortunately strengthened by the policy of the Jewish Board of Guardians, — the dispensers of the charity of wealthy English Jews towards their miserable fellow-believers. Out of some £13,000 to £14,000 expended annually in relief, about one-half seems to be lent or given in the form of business capital, enabling the workman to rise into the position of a small master. The recipients are not pauperized; but the class through whom they make their way upward are still further degraded (pp. 573, 574).

I have reserved until last the consideration of Mr. Booth's practical conclusions, based on the evidence thus collected. They will be found in his chapter on "Class Relations" at the end of Part I, as well as in the chapter on "Sweating," before referred to, and in his concluding remarks. I am afraid it must be said that Mr. Booth is more convincing when he sets forth the results of his investigations, than when he comments upon them. An example is furnished in what he says of sweating. He points out, what is abundantly manifest from the sections on the tailoring, bootmaking and furniture trades, that the sweater of the popular imagination — the grinding middleman fattening on the profits he sweats out of wages — has no existence; the true sweater, as the name is employed in the trades themselves, usually without any particularly bad connotation, is the small, struggling master. He tells us that it is "the multiplication of small masters" which really leads to the sweating evils of long hours, low pay and unsanitary conditions" (p. 488); and again, that "the trades of East London present a clear case of economic disease, and the multiplication of small masters is the tap-root of this disease." He offers the very practical suggestion that the work of the factory inspector should be facilitated by obliging every owner of premises used for manufacturing purposes and also the employer, when any labor other than that of the wife is employed, to take a license. Thus, when Mr. Booth has the facts in his mind, he recognizes distinctly that certain forms of industrial organization have evil results.

But our author is a statistical economist only by grace; by nature he would appear to belong to that larger body of "common-sense" persons according to whom the one explanation of every difficulty is that all cannot be equal, and that the "fittest" come to the top. And sometimes nature is too powerful for grace: as where, speaking of the evils which exist in the sweated industries, Mr. Booth tells us that "many or *perhaps most* of them are not due *in any way* to the manner of employment. Their roots lie deep in human nature." And again, with more emphasis: "Such troubles have not, *on the whole*, much to do with any system of employment: they are part of the general inequalities of life" (p. 487). It is not that there is no truth at all in this view of the matter; but it

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is surely stated too broadly here, and it is precisely passages of this kind that are so eagerly seized upon by the apologist for things as they are. Moreover, such undue emphasis on one side of the problem seems to prevent the writer from taking a concrete view of the situation when he comes to make his final suggestion. With class A, he tells us, nothing is feasible except its destruction; it must be "harried out of existence" by the enforcement of sanitary, police and school regulations. But with class B the case is different: they are the incapables, who cost more to the community than they produce, and who pull down, by their competition, classes C and D. If only B could be removed from the scene, C and D would get on well enough. Let the state, then, take charge of them, — they are but 100,000, — and remove them from the sphere of competition. The practicability of this plan for saving individualism by a large dose of socialism, as Mr. Booth himself describes it, I need not here consider. But the point I would ask Mr. Booth's attention to is this: Granting that such a disappearance of class B for a time would be in many ways a relief, is not the present organization of industry of such a kind that it would at once begin to grind out another class B? Mr. Booth has examined (pp. 147, 148) into 1600 families belonging to classes A and B. Of these, 60 were loafers, and there were 231 "whose poverty was the result of drink or obvious want of thrift." But 441 "had been impoverished by illness or the large number of those who had to be supported out of the earnings"; and if you abolished class B to-day, men of class C, from sickness or from having large families, would begin to renew it to-morrow. It is still more significant that there were 878 "whose poverty was due to the casual or irregular character of their employment, combined, more or less, with low pay." Even if these are now not fit for anything better, still, as we have seen in the case of the dockers, their very shiftlessness or laziness is itself in some measure the result of irregular employment. It is in economics as in philosophy: free will and necessity are both true; circumstances are as men make them, and men are as circumstances make them.

If I have dwelt unduly on what seem defects, it is because the book is packed so full of useful matter that it is impossible to furnish an abstract of it. In spite of all its limitations, it gives us a foundation such as we never had before both for practical action and for economic speculation. I trust Mr. Booth will have strength and perseverance to go on with his task. I must not omit to add that the book is accompanied with a wonderful map of East London, wherein each street is marked according to the class of its inhabitants. This should be the model for many a similar chart in our great cities, which would be of no little service in the practical work of charity.

W. J. Ashley.

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REVIEWS.

The Theory of Credit. By HENRY DUNNING MACLEOD, M.A. In two volumes. Vol. I. London, Longmans, Green & Co., 1889.

Mr. Macleod's latest work, of which the first volume is before us, is a restatement, with amplification, of the first volume of his *Elements of Economics*, published nine years ago, which was itself a restatement, with amplification, of an earlier work, *The Elements of Banking*. His aim in all three of the works named is to show that credit is capital. This conception has been in the growing or progressive stage in his mind. In the *Elements of Banking* (page 143) we find it stated in these words: "Hence it is seen how mercantile credit is mercantile capital," the identity of credit and capital being here limited to mercantile affairs. In the *Elements of Economics* (I, 178, 179) it is shown that an order for, or a promise of, or a right to, goods is of the same value as the money with which the goods might be bought, and hence

> This order or promise or right is what is usually called credit, and it is clearly seen that, although it is of a lower and inferior form, yet it is of the same general nature as money. And as we are in no way concerned with the materials of things; and since these rights, or orders, may be exchanged or bought and sold equally as well as any material chattels, they are called *pecunia*, *res*, *bona*, *merx* in Roman law; χρήματα, ἀγαθά, πράγματα, οἶκος in Greek law; goods, chattels and vendible commodities in English law; and therefore wealth in economics.

This phrase, with its Greek and Latin terms (and sundry additions thereto), re-appears so frequently in *The Theory of Credit* that it becomes a burden or a laughing-stock according to the mood of the reader.

In the work under review, the identity of credit and capital as to their general nature is maintained without qualification. At page 308 *et seq.* the author makes an attack on J. S. Mill in the same terms as at pages 86 and 101 in the *Elements of Economics*, but with some amplification. It is important to examine Mr. Macleod's argument here, because it helps us to measure his eccentricities. He says:

> We have first to show that Mill admits that personal credit is wealth. In accordance with the unanimous doctrine of ancient writers for 1300 years, Mill says (Preliminary Remarks, page 4): "Everything, therefore, forms a part of wealth which has purchasing power."
>
> Then he says (Book III, ch. xi, sec. 3): "For credit though it is not pro-

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ductive power is purchasing power. . . . Credit, in short, has the same purchasing power as money."

Now if Mill lays down the doctrine that everything which has purchasing power is wealth, and if he says that personal credit is purchasing power, then the necessary inference is that personal credit is wealth. That is a syllogism from which there is no escape.

The heading of one of Mill's chapters is "Of credit as a substitute for money." Now if one quantity can be a substitute for another it must be of the same general nature. If a person wants wine and cannot get it, he may put up with beer as a substitute; but a pair of shoes could never be a substitute for a glass of wine. Now if credit can be a substitute for money, credit must be of the same general nature as money. But money is an independent exchangeable quantity; hence credit must also be an independent exchangeable quantity.

And by the same reasoning a horse chestnut must be a chestnut horse. What Mill says in his "Preliminary Remarks" is this:

Money being an instrument of an important public and private purpose is rightly regarded as wealth; but everything else which serves any human purpose, and which nature does not afford gratuitously, is wealth also. To be wealthy is to have a large stock of useful articles or the means of purchasing them. Everything, therefore, forms a part of wealth which has a power of purchasing; for which anything useful or agreeable would be given in exchange.

Mr. Mill is here speaking of *things* that are material and tangible, that minister to human comfort and are not afforded gratuitously. Everything, *i.e.* every *such* thing, forms a part of purchasing power. Putting off for the moment the question whether credit is really a material and tangible thing that ministers to human comfort and is not afforded gratuitously, it is perfectly plain that Mill did not here intend to include either beliefs or lawsuits among the things which have purchasing power; therefore Mr. Macleod's syllogism comes to nothing.

We remark here that Mr. Macleod gives us with distressing prolixity the derivations and meanings of many words used by him, but nowhere applies his extensive learning to the derivation of the word credit. For example, on page 105, he gives us the derivation and meaning of the word production, "from the Latin *producere*, which means to lead or bring forth, or to expose for sale." Then by way of illustration we have quotations from Terence, Menedemus, Suetonius, Isaiah, King Lear, Julius Cæsar and Martin Chuzzlewit. Now the word credit is derived from the Latin *credo*, which means "I believe." Therefore credit signifies a *belief* on the part of a greater or less number of persons that some one person will pay what he has promised to pay or ought to pay. In one place in the volume we find a recognition of this meaning of the

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word, but only in order to stigmatize it as a "false concept" needing to be put to "summary execution" (page 316):

> Credit, *in popular language*, is personal reputation which a person has, in consequence of which he can buy money or goods or labor, by giving in exchange for them a promise to pay at a future time.
>
> A credit *in law, commerce and economics* is the *right* which one person has to *compel* another person, the debtor, to pay or do something.

Returning to the attack on Mill: we have seen that since Mill obviously did not intend to include mental operations or legal proceedings in the category of things which have purchasing power, Mr. Macleod's syllogism is no syllogism at all. The next proposition is that nothing can be a substitute for another thing unless it is "of the same general nature." Credit, therefore, being a substitute for money, must be of the same general nature as money. And since money is an independent exchangeable quantity, credit must be an independent exchangeable quantity. I have heard laboring men say that a tightening of the belt is a good substitute for food when food cannot be had — temporary, of course; but so also is credit only a temporary substitute for money, as Mr. Macleod admits.[1] Subsoil plowing is a good substitute for rain in a dry season. Sand is a good substitute for blotting-paper. Saccharin is a good substitute for sugar, but chemists tell us that they are not "of the same general nature," sugar being a food, while saccharin is not. Cases might be multiplied indefinitely to show that one thing used as a substitute for another is not necessarily "of the same general nature."

Mr. Macleod is a barrister, and he is deeply interested in the Roman law. This is his chief study. Whatever may be his aptitude for economics, it is evident that ancient law and the growth of jurisprudence are his great preoccupation. Only thus can we account for the fundamental error of his *Theory of Credit* — the error of mixing law and economics together in an indistinguishable medley, withering and blighting to the human intellect. The key to his book and to his system is that credit is not a state of mind, a belief, a mental operation, but a right of action, and that a right of action is "an economic quantity," meaning by this that it is something within the field and scope of economic science. Now a right of action represents legal authority, with which political economy has nothing whatever to do. Voluntariness is the very essence of economics. What men do because they are so inclined is its sole concern. When compulsion comes in, political economy as a science goes out. Political economy may have something to say, as an *applied* science, to executions in the hands of sheriffs, to imprisonment

[1] Credit is always created with the express intention of being, or of being capable of being, extinguished at a certain short definite time; p. 277.

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for debt, to the institution of slavery, and even to the infliction of torture, but it is in the domain of *pure* science that Mr. Macleod thinks he is leading us. A theory is always in the domain of pure science.

But is it true that the right of action — the legal power to enforce payment, which legal power can be sold and transferred — is the essential part, or any part, of what is known universally as credit? We can answer this question by asking how much credit would be given, how many goods would be sold on credit, if the creditor supposed he would have to sue for his money. Is not this conception of credit really a contradiction of terms? A lends to B because he credits, or believes B, and thinks that he will not have to sue B. The sheriff does not make his appearance until the credit is found to be misplaced, unfounded, erroneous. It is only in a case of false credit that the right of action ever comes into play. The right of action is at most only ancillary to the credit. I know at this moment a large and successful dry goods house, of long standing, that gives credit extensively but never brings a suit for the collection of a debt. As to this firm, the trade in dry goods would go on all the same if all laws for the collection of debts were abolished. Credit would not be shortened in any degree at that shop. It is not a very extreme anticipation to look forward to a time when all laws for the collection of debts may be done away with. The premises of such a condition would imply no shortening of credit, but rather an extension of it. In such a case, of course, credits would be as salable as now, and rather more so, since by the hypothesis people would be more honest. All the phenomena, if there be any, which justify Mr. Macleod in thinking that credit is capital would remain in full force and play after all rights of action had disappeared. Is it necessary, at this late day, to argue that if I have a belief that A will return to me a wagon that I have lent him, in as good condition as when he took it, with something (say a pound of butter) for the use of it, my belief is another wagon, or is a part of a wagon, or an inferior wagon, something like a wheelbarrow? Mr. Macleod allows (page 293) that credit, while it is "a species of commodity or merchandise of the same nature as money," is nevertheless "of an inferior order." If my belief is a little wagon, where is it, and to whom does it belong? How much time would be required to double all the wagons and all the other movable wealth in the country in this way? And is there any limit to the amount of wealth a country may thus acquire?

We have touched upon Mr. Macleod's main contention. We have sought not to misunderstand it and especially not to misrepresent it. When we come to the details of his work we are bewildered with such paradoxes as "negative economic quantities" (page 40); "there is no such thing as absolute wealth" (page 28); "there is no such thing as

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absolute capital" (page 117). We expect every moment to come upon Bishop Berkeley's metaphysical paradox, "there is no such thing as matter"; and if we should find it here, we should not be at all surprised. Yet Mr. Macleod is not unfamiliar with pure economics, as his chapter on value sufficiently proves. The definition of value is as yet the *impasse* of political economy. The evidence of this is that there is not to-day any well-established doctrine of value. Mill began his treatment of it by saying that "there is nothing in the laws of value which remains for the present or any future writer to clear up; the theory of the subject is complete." At the bottom of his own treatment of it, as also of Ricardo's and, with some limitations, of Cairnes's, lies cost of production as the regulator of value. Macleod was among the first to discard cost of production altogether. Demand, he says, regulates value. He has not worked out the theory of value to any satisfactory conclusion. He has tried to dovetail it with his theory of credit, and in so doing has introduced as much confusion as he had previously got rid of. But that he is right in his main contention, that value depends on supply and demand and not on cost of production, is, I think, the growing belief of economists to-day.[1] What he has written here makes amends for some of his vagaries and gives him a claim to respectful attention. Both here and elsewhere, however, the book is more suggestive than scientific.

HORACE WHITE.

War with Crime; being a selection of reprinted papers on Crime, Reformatories, *etc.*, by the late T. BARWICK LL. BAKER, Esq. Edited by HERBERT PHILIPS and EDMUND VERNEY. London and New York, Longmans, Green & Co., 1889. — 8vo, xxix, 299 pp.

The Criminal. By HAVELOCK ELLIS. Illustrated. New York, Scribner and Welford, 1890. — 8vo, viii, 337 pp.

The *rationale* of sentences for crime is a subject meriting the most careful study; yet so far as the average citizen or the average college graduate or the average lawyer knows, it has never been scientifically treated at all. The two works under consideration are useful, — absolutely, because of what they contain, and relatively, because of the great dearth of literature bearing upon the subject of which they treat.

Mr. Baker was an English country squire of the best sort. By the German Professor von Holtzendorf, who was interested in these men, he was described as typical of the class to which he belonged. Baker was primarily interested in juvenile reformatories, and he wrote for various

[1] See on this point Boehm-Bawerk, *Capital and Interest* (translation), pp. 133–141.

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periodicals and associations a great number of articles and addresses on this and on other phases of reformatory and deterrent work. The volume before us is a collection of these scattered papers. Many of the papers included by the editor resemble one another too closely to be thus reprinted side by side. "Varied iteration" is a helpful device in popularizing ideas, and Mr. Baker was justified in treating the same subject in much the same way for two different papers or on two occasions widely separated; but the editors were not justified in including both letters or both addresses in this posthumous collection of his writings.

To the ordinary citizen, Mr. Baker's work will give a very stimulating idea of what one public-spirited citizen can accomplish. The book is free from the cant, but instinct with the spirit of philanthropy. In the reformatory under his charge, Mr. Baker interpreted "good conduct" on the part of the inmates to mean hard work; he considered the deterrent element in punishment to be of much more importance than the reformatory element, and the institutions managed on the principles he advocated were sometimes so successful as to render their continued existence unnecessary. The supply of juvenile criminals was cut off at its source.

Mr. Baker believed that the sentence for all ordinary first offences should be short and light, but that sentences for subsequent offences should be indeterminate, leaving the final discharge of the prisoner to be fixed by the prison managers instead of by the judge. The basis of all his views is to be found in the idea that sentences should be apportioned according to the character of the criminal, and not according to the crime. He saw clearly, however, that our present courts are not fitted either by training or practice to impose sentences according to the new and more rational criterion.

The leading thought in Mr. Ellis's book is also that we must study criminals rather than crimes, if we would deal effectively with the "criminal classes." When a "defence" of kleptomania was set up in a case of theft, an English judge is said to have observed: "Yes, that is what I am sent here to cure." "We need not hesitate," says Mr. Ellis, "to accept this conception of the functions of the court, provided always that the treatment is scientific, effectual and humane." He is inclined to agree with those who think that instead of "punishment" we should speak of "social reaction against crime."

While the author states that the book contains nothing original, yet it assuredly contains a great deal that is new, at any rate to such readers as are acquainted with only the English works dealing with the subject of which it treats. It is a *résumé* of the results thus far reached by the students of criminal anthropology of Italy, France, Germany, England

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and the United States, together with a view of the literature of the subject, and an interesting chapter on the treatment of the criminal. The commoner abnormalities of the criminal, physical and psychical, are noted; and the theory of atavism as an explanation of his anti-social tendencies receives constant notice, though it is not found to be as all-explanatory as Bellamy thinks it will be in his millennium.

Both of the authors under review urge as the strongest proof of the impotence of our present system of dealing with criminals, the increasing number of recidivists or habitual offenders. "Each ten-times-convicted offender is a standing, glaring proof of the inefficiency of our present system to prevent offences," says Mr. Baker. Ellis states that more than forty per cent of the women committed to prison in Great Britain during 1888 had previously been convicted more than ten times. Of the persons committed during the year 1887, 5686 of the men and 9764 of the women had been committed more than ten times. That the same tendency to recidivism exists in this country can be ascertained by investigating the records of the nearest county jail. It is Mr. Ellis's opinion that, since the time of Howard, the countries of western Europe have been so busy reforming their prisons that they have neglected to reform their prisoners. The latter is obviously the harder task.

So far as I am aware, the science of criminology has been taken up for investigation and study in only one American university, though desultory work in charities and corrections is done in several of them. The need for the scientific treatment of the subject is pressing, and it is to be hoped that these two interesting volumes will do much to attract the attention of students of social science, and to bring the matter to the notice of all thoughtful citizens.

A. G. WARNER.

Eisenbahnreform. Von EDUARD ENGEL. Jena, Herman Costenoble, 1888. — 8vo, 219 pp.

It is many years since practical railway reformers derided the projects of Brandon and Galt in England, and of Perrot in Germany. But the old idea has been taken up anew by Herr Engel, and is fast attracting attention in all quarters, owing to its practical realization in Hungary, and its projected adoption in other countries. Engel's book is all the more important because it is chiefly to the indefatigable author that these new experiments are due. The volume before us is in some sort the Bible of the new school of transportation enthusiasts.

The main ideas may be summarized as follows. The prevalent system of passenger fares is one based chiefly on distance. Concessions are made only on the very long distances, owing to competitive centres,

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and on the very short distances, owing to the expansibility of the traffic. It is the medium and comparatively long distance traffic that suffers. The fares are so high and the accommodations so poor as to restrict immensely the possible advantages of a system of improved transportation. The reason of all this is the distance principle. It is accepted simply because it has come down unchanged from the methods of eighteenth century transportation. But the principle is vicious and illogical. It cannot be based in the value of the service, because a short ride may be far more valuable and important to a passenger than a long ride. We cannot possibly analyze or measure the desirability of a ride by its length. There is no connection between the two. The value to the passenger can be gauged only by considerations of a purely personal nature, which necessarily vary with each case. The mistake has arisen from confounding persons with commodities whose value is really changed by transportation. Just as the value of a letter or telegram is independent of the distance traversed, so is the value of a railway journey to the passenger. The distance tariff was once the universal rule for letter postage also, and Rowland Hill's proposals were treated with the same contemptuous incredulity as those of Perrot and Engel. But the successful introduction of penny postage showed the uselessness of the distance tariff. So it must be also with passenger fares. For the oft-repeated assertion that letters are different from passengers proves nothing. They are not different in the one controlling consideration — that the amount of the transportation does not proportionally change the value of things carried.

Secondly, the principle of distance cannot be based on the cost of service. For although it indeed costs more to transport a passenger a long than a short distance, the relation is not exactly proportional. Many of the expenses, in fact the large majority, are fixed expenses. It is utterly impossible to determine the cost of service for each individual service. All that can justly be demanded is that the average fare should exceed the cost of service of the average act of transportation, *i.e.* that the total receipts should exceed in a certain proportion the total expenses. Now this can be accomplished as well by a uniform fare as by a distance tariff. Again, the distance tariff system as actually practised loses sight of the fact that the cost of service decreases with the frequency of the transportation, and that low rates on a long distance may under certain conditions be more lucrative than high rates on a short distance. The amount of transportation as compared with its length seriously modifies the application of the cost of service theory.

Having shown that the distance principle is illogical and unnecessary, Herr Engel sets forth his own plan. He does not favor at this time the uniform fare, — which is perhaps too radical an innovation, — but the

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system of zone tariffs. As the telegraph charges are the same for all stations within a certain radius, but increase by stages beyond, so the passenger fares should be arranged by certain definite gradations according to zones, the fare being the same to all stations within the same zone. The zone fares should be just low enough to produce the greatest profits, — and this point can be ascertained only by experiment. In connection with this many other reforms should be undertaken, such as greater speed, comfort, *etc.*, all of which would be not only possible but profitable to the railways. The book closes with a glowing picture of passenger transportation as it might be, compared with passenger transportation as it is.

The first point to be noticed is that Herr Engel does not, like some of his predecessors, apply his system to freight rates. Here he has no fault to find with the prevalent system, presumably because commodities are changed in value by transportation. But it is difficult to see the distinction in theory between rates and fares. A bushel of wheat does not cost any more in New York if it comes from Ohio, than if it comes from Nebraska. The value is the same to the purchaser. So that Herr Engel is in reality less logical than his predecessors. If the theory is a failure as to fares, it cannot be upheld as to rates. Passing over this inconsistency, it may be admitted that the zone tariff, as actually carried out during the past year, has been a success. It is true that the accompanying reforms advocated by Engel have not been adopted — such as greater speed, increased comfort, more regularity, *etc.* But the experiment has been profitable because of the immense increase in passengers and the decrease in expenses.

Of course many of the conditions of the successful application of the theory are lacking in this country. There is no unity of administration, no distinction of classes with such unprofitable deadweight in the upper classes, no such extravagance in station equipments and fixed expenditures. The whole system will for a long time have only a theoretical importance for us. But what the plan means when applied by a centralized administration can be seen approximately by comparing the system on the New York elevated road, with its low uniform fare, to the system of the London underground road, with its complicated and high distance tariff. In truth the principle of value of service has never been so highly developed in passenger as in freight traffic with us; and when our railway system will have ultimately settled down to its permanently consolidated form, the zone system may be as applicable and profitable here as elsewhere. But that time is yet far distant. In the meanwhile Herr Engel's book deserves serious consideration and study.

E. R. A. S.

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Die drei Bevölkerungsstufen. Ein Versuch, die Ursachen für das Blühen und Altern der Völker nachzuweisen. Von GEORG HANSEN. München, J. Lindauer, 1889. — 8vo, viii, 407 pp.

We have in this volume a sociological study of great value. It presents in a broad and scientific way the preliminary data and provisional conclusions of an investigation that is beginning to engage well-equipped students in several countries, and that is destined to yield, in the near future, results of the deepest interest, whether regarded from the standpoint of pure theory or from that of practical policy. The problem is that of the population rate in its relation to social structure and function, and to the relative well-being of social classes. This is a larger question than the one associated with the name of Malthus. It has been apparent for some time to statisticians and to physicians familiar with the physiological reactions of modern city life, that the whole philosophy of Malthusianism would have to be reconstructed. The proposition that population tends to increase beyond subsistence must be split up into several more specific propositions, from each of which a series of most interesting corollaries may be derived.

As between city and country, birth rates and death rates are conspicuously different quantities, and the same is true as to the different social classes, namely, the agricultural or land-owning population, the brain workers or middle class, and the manual laborers. Dr. Hansen has wrought the existing knowledge on these points into a systematic sociological theory. The most important parts of his data are late statistics of German cities, and especially of Munich, showing that city populations are sustained and increased only by immigration from the country. The immediate inference from this fact is one that shatters a tacit assumption which a good many writers besides the socialists have made. The three social classes are not self-perpetuating. They do not stand side by side like unmingling races, but only mark different phases in the development of the same population. Only the land-owning class is permanent; the other two are constantly disappearing, only to be as constantly renewed.

The brain-working or middle class, including the mercantile, manufacturing and capitalist classes generally, are the overflow of the land-owning class. No country without a vigorous rural population, multiplying beyond the limits of a merely agricultural life, can have a progressive middle class, and with it such characteristic features of a high civilization as accumulating capital, industrial enterprises, education, literature and art. In like manner, the manual working or wages class, including all grades from skilled mechanics to day laborers, are the overflow of the middle and to some extent of the agricultural class.

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Competition, intense and increasing, is the characteristic of middle-class life, and in the struggle thousands upon thousands are worsted. Those who have physical and moral vigor left become the wage earners; others swell the ranks of crime, insanity and suicide. The third class, in its turn, multiplies beyond its opportunities for bread winning, and the overflow becomes this time the social residuum of tramps, paupers and outcasts. The tramp, in Dr. Hansen's view, is probably the least objectionable variety that the social residuum can develop, inasmuch as the tramp does not to any great extent perpetuate his kind. The worst possible variety is the sodden wretch that continues to breed in city slums, as in East London.

Each of the three classes acquires a distinctive nature. The second class is higher than the first, being recruited from it by a process of selection that takes out the energetic, the enterprising and the intellectually keen, whose special qualities are intensified by the competition of second-class life itself. The third class, on the other hand, is lower than the first in many points besides that of economic condition. It is lower especially in reserve or potential vigor. The second class has a low birth rate and a low rate of survival. Most burgher families die out. Business is conducted for the most part by self-made men. The rapidity with which old firms disappear is a matter of common observation and is attested by statistics. In the third class, marriage is frequent and early and the birth rate is high. Bodies are ill developed, as shown by English, French and German statistics of unfitness for military service. The conditions surrounding childhood are bad. Minds and characters are unformed. The energetic and really saving workingman can often rise to the second class, but for the most part the movement from the third class is into pauperism.

Dr. Hansen's is a mind that sees easily into complicated relationships that are baffling to students generally. He develops his thesis from many points of view. The three classes are studied not only as constituent elements of society and as factors in the state, but in their historical genesis. The phenomena they exhibit are examined also as seen in each of the larger nations separately. These chapters, amounting to a philosophy of history, are full of thoughtful reflections. Most deserving of sober consideration are the comments on the brilliant but short-lived civilizations that have shone by using up, not the interest merely, but the capital of population; and on the United States, where the natural blossoming time has been hastened, and a result that might have been incomparably magnificent has in our author's judgment been ruined, by the hot-house forcing of tariff legislation. A concluding part on the duty of the state contains some recommendations not warranted by the facts as shown, but fresh and suggestive enough to be

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very welcome to readers surfeited with Georgeism and Bellamyism. The things proven seem to be: that it is desirable to maintain the agricultural population in over-multiplying vigor, whereas, in fact, it tends towards sterility; that it is desirable to perpetuate keen competition in the second class, whereas its members try in every way to limit competition; and that it is desirable to raise the standard of life and check the increase of the third class, whereas its natural tendencies are towards a low standard and unlimited propagation.

It will be seen that this is no ordinary book. It takes a broader view of the social problem than economists, philanthropists and writers on statecraft are wont to take, and it brings forward practical considerations of a kind that optimistic reformers would prefer to wave out of sight. The chief defect of the work is one that its author recognizes: its statistical basis is not as broad as could be wished. Yet it is broad enough to build a working hypothesis on, and that is really all that Dr. Hansen claims to do. Two other criticisms may be added. Dr. Hansen's economic views are not always sound. He has an inadequate conception of the economic reaction of urban industries upon agriculture, whereby the production of raw materials, including food, is enormously increased. His ideas are, in fact, so far wrong that he condemns agricultural colonies of unemployed workmen on the ground that whenever a vagabond is put at work an industrious man is necessarily displaced! The other criticism relates to the author's biological knowledge. Apparently he is not familiar with some of the most important recent work in physiology, showing the effect of education, intense competition and other forms of nervous strain, upon birth rate and the vitality of offspring. In this particular, the book is less satisfactory than the brilliant *Éducation et Hérédité*, by the lamented M. Guyau. It is nevertheless a book that ought to be translated and put within easy reach of all classes of readers. It is exactly what is needed to open people's eyes to the true character of much of the current social-reform literature.

F. H. Giddings.

The Growth of Capital. By Robert Giffen. London, George Bell and Sons, 1889. — 8vo, 169 pp.

Of all dry statistics, economic statistics are the driest. And when they cease to be dry, *i.e.* come into connection with living questions, — as for instance the statistics of accumulated wealth and its distribution, statistics of profits, of wages, *etc.*, — they are apt to become unmanageable. Mr. Giffen has attacked, with his customary thoroughness and lucidity, one of those problems, *viz.* that of the total capital or income-bearing wealth of Great Britain; and he has not hesitated to make the

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inquiry as fruitful as possible by comparing the present with the past, the resources of Great Britain with those of other countries, the relation of wealth-valuation to prices and the value of money, the burden of public debt, the relation of property and income, the proportion of different descriptions of property in the community, *etc.*

No estimate of the total wealth of a community can be termed certain and exact. It is impossible to ascertain by a census the wealth of all individuals, and then by adding the returns and subtracting mutual indebtedness, to get at the total wealth of the community. We can only estimate the total wealth on the basis of tax returns, — in the United States by the general property tax, in Great Britain by the income tax. The result will be trustworthy according as the valuation is more or less carefully made.

By methods which he fully explains and which seem trustworthy, Mr. Giffen estimates the total wealth of Great Britain in 1885 to have been £10,079,579,000. In 1875 it was £8,548,120,000, and in 1865 it was £6,113,000,000. The increase from 1865 to 1875 was 40 per cent; from 1875 to 1885 it was only 17.4 per cent. This startling decrease in the rate of accumulation is explained by the fall in prices during the latter period, which Mr. Giffen believes to have been at least 15 per cent; so that while property in things has increased as fast as ever, the valuation of these things in money shows a much lower rate of growth. This is particularly true of land, where income from rents has actually decreased, causing a corresponding decrease in the capitalized value. Land also occupies from decade to decade a relatively less important position among the items of national wealth in Great Britain. In 1690 land constituted 60 per cent of the total property of England; in 1800, 40 per cent; in 1865, 30 per cent; in 1875, 24 per cent; and in 1885, only 17 per cent. The last three figures refer to Great Britain. The largest single item of property now is houses.

It is impossible in this place to give even a *résumé* of the other comparisons which the author draws, — the wealth of England at different periods; the relative wealth of England, Scotland and Ireland; and the wealth of Great Britain compared with that of other countries. Many interesting side-topics are suggested, some of which the author promises to follow up in the future. Criticism may cause modification of some of his conclusions, but as things now stand Mr. Giffen has certainly won for himself an authoritative position on the question of statistics of wealth.

R. M. S.

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Les Progrès de la Science Économique depuis Adam Smith. Révision des doctrines économiques. Par MAURICE BLOCK, membre de l'Institut. Paris, Guillaumin, 1890. — 2 vols, 8vo, xii, 557, 598 pp.

The almost complete indifference of French economists to the recent reform movements in other countries has become a by-word. It explains in great part the discredit into which the authority of economic science has fallen in France, — a discredit similar to that noticeable on the other side of the channel a decade ago. In M. Block's "Progress of Economic Science since Adam Smith," we now have a work which in some respects challenges comparison with the best productions of recent times in any country.

M. Block has for years published in the *Journal des Économistes* a periodical review of the newest literature in all languages. As his name indicates, M. Block is of German descent; at all events he was from his earliest years thoroughly familiar with the German language. And it is precisely his complete acquaintance with German literature (which, however, does not in the least detract from his thoroughly French point of view and grace of style) that serves to give the work its peculiar value and distinguishing characteristics. For whatever we may think of them, it is from Germany and Austria that almost all recent impulses to reform in economics have come.

A word first as to the method of the work. At the beginning of each chapter M. Block gives in customary text-book form his own ideas on the subject in question. There is almost no statistical or historical matter, but simply the usual "philosophy" of the topic. This in itself would not attract any particular attention to the work. But the greater portion of each chapter is devoted to an account in smaller print of the views of eminent writers since Adam Smith on the point at issue. The authors are allowed to speak for themselves in extracts sometimes several pages in length, and M. Block then sums up, seeking to reconcile differences and to ascertain whether any real advance of doctrine is apparent. These parts of each chapter constitute the value of the work; for they afford the reader a clear, comprehensive and, it must be said, almost absolutely accurate account of the most important ideas advanced during the century. We have, in fact, a history of recent political economy, arranged not chronologically or by authors, but according to topics. After an introduction which treats of method, definitions and classification, we come to the first and in some respects the most important book — "Fundamental Notions." Here eight chapters treat successively of wants, goods, value, reason and sentiment, egoism and altruism, individualism and socialism, economic laws and the economic principle. The following four books discuss production, circulation, dis-

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tribution and consumption of wealth in the customary subdivisions, and the work concludes with a summary of the progress made since Adam Smith. When we reflect that each chapter gives us a succinct *résumé* of the literature, it is evident that we have here a veritable compend of economic science. The work is not intended for beginners or laymen, but it will be a godsend to many whose library or linguistic attainments are limited.

And yet with all its array of interesting and valuable material the work is disappointing. This is mainly for the reason that M. Block is one of the most uncompromising adherents of the classical school. It is indeed true that M. Block objects to the word orthodox, contending that it is not a question of faith, but of knowledge; it is true that he objects to the terms classical school and Manchester school, saying that he is the adherent of no one man and of no one school, but only of the truth, wherever it may be found. All this is very praiseworthy, but the fact remains that M. Block, at what we trust is not yet the end of a long career, almost inevitably identifies the "truth" with the tenets of his earlier *confrères*. France, indeed, has never shared many of the cherished doctrines of the English orthodox school. The French economists, mainly through the common-sense influence of Say, refused from the very beginning to accept many of the mysteries of the Ricardian cult. The wage-fund doctrine, the Ricardian theory of profits and even the law of rent never found a ready acceptance with French writers. And yet the prevalent French political economy has been on the whole the most unbending and unyielding of all; and the study and reputation of the science have been the most unsatisfactory, for reasons which will soon be presented in another place by one of the French economists themselves. In so far as M. Block reflects this general condition, — and he is a representative Frenchman, — his work is disappointing.

A complete statement or criticism of M. Block's views would require an essay about as comprehensive as the work under review. There is room here only for a few general reflections.

The three main points of difference between the classical and the modern school are those of natural law, method and governmental interference. As to each of these questions there are extremists on both sides. It is of course undeniable that there are natural laws in economics, if by a natural law we mean that certain given causes under given conditions will produce certain results. Otherwise there would be no science at all; for the essential work of a science is to explain how and why certain facts necessarily lead to certain consequences. The claim of the extreme historical school that there are no laws in economics would convert the science into a mere mass of undigested

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facts. It would rob us of the possibility of ever explaining or analyzing the nature of industrial society. The trouble with the classical school, however, was and is the misuse of the term natural. In their zeal to discover "natural" laws they forgot the limitations of time and condition. They reached results which were hypothetically true, but used them as if they were actually true. M. Block attempts to evade the issue by saying that the laws are eternal and immutable, but that their application is conditional. But the trouble with the orthodox writers is precisely that they confound the abstract law with the application. The real objection to the classical school was not so much that they set forth natural laws, as that they set forth false natural laws. As in the case of the vulgar adversary of "theorists"; what he really objects to is not "theory" (for theory is the basis of all practice), but false theory, which usurps a proud position and looks down on the others with contempt. So the modern economist also, in crying out against "natural laws," really wishes to voice his protest against certain assumed but really false laws. With the veritable economic laws, which are based on a broad foundation, and which are capable of lending themselves to the changing requirements of time, place and condition, the economist can have no issue. But many of the "natural laws" of the Physiocrats and the classical school had no such characteristics. And it was because of the chasm between the ideal law and the actual facts that the classical school came to grief.

Second, as to method. The classical school disdained history and comparison, because the science was to them an exact science like the mathematical sciences. It was so easy comparatively to reel off glittering generalities deduced mathematically from a few general principles, that almost every one with a logical bent felt himself competent to write a treatise on economics. The science, in fact, was fast becoming mere logomachy, out of touch with reality, out of sympathy with facts. The historical school called attention to the importance of laying a broader foundation. They desired to use history and comparison, not simply for verifying, but also for ascertaining principles. Certain extremists have indeed laid themselves open to the charge of being mere historians and not economists. The recent Austrian school has done well to emphasize this point. What is needed is a fusion of the two. The mere accumulation of facts is valueless (except for antiquarian purposes) unless it is made to elucidate some principle. But it is precisely through the analysis of the facts that the trained economist will often succeed in discovering the principle. A great genius will sometimes be able to evolve the law, as it were, intuitively. And we can certainly have no dispute with principles so discovered, if they stand the test of history and comparison. But it is undeniable that the historical method has

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often widened the view, that it has been more fruitful of results and more influential in shaping practical legislation, and that it has given the science an impulse which is painfully lacking in those countries still dominated by the older methods. The historical method requires, indeed, more patient study and often weary application; but if the substructure is more solid the edifice is apt to be more enduring. By all means let us have theory. If it is true, let us greet it gladly, whether its source be the deductive or the historical method. But let us not forget that the historical and comparative method alone can furnish us in all cases the means of testing the truth, and in some cases the means of ascertaining the truth. M. Block forgets this, and his argument, therefore, is correspondingly weak.

Third, as to the question of government interference. M. Block shows us clearly enough that the historical extremists have often exaggerated the traditional view of *laissez faire*. And he is not far wrong in asserting that the "ethical" school has frequently mistaken sentimentality for science. But the objections to the orthodox writers are nevertheless well grounded. The opposition to mediæval interference with trade and industry which culminated in the Physiocrats and Adam Smith was certainly a healthy reaction. But the misapplication of the doctrines of individualism and liberty to conditions which obviously demanded some check upon growing injustice and industrial anarchy produced a natural counter-reaction. It was the excessive and often unconscious optimism of the older school which led to socialism. And M. Block, struggle though he may, is still thoroughly imbued with this all-pervading optimism, this contentment with the actual, and impatience of the ideal. There is indeed some excuse for the French writers. For in France, notwithstanding all the orthodox views, government has interfered perhaps more widely and less wisely than anywhere else. But continual harping upon the beauties of actual conditions, and the unfortunate attempt to separate the science which teaches what is from the art which teaches what ought to be, have resulted in the comparative sterility of French economics.

We are fortunate in America in possessing only a few extremists on either side. We are catholic enough to appreciate good work, whether it be done from the historical or from the abstract standpoint; and some of us at all events believe that a combination of the two is not only possible, but in reality the most desirable and logical means of progress. M. Block does not agree with us; but let us not on that account forget that he has written a work of the first importance and of enduring value.

EDWIN R. A. SELIGMAN.

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Silver in Europe. By S. DANA HORTON. London and New York, Macmillan & Co., 1890. — 8vo, xxii, 290 pp.

Mr. Horton has collected in this volume nine speeches and papers in favor of bimetallism, one of which discusses Secretary Windom's scheme, and another the "Pan-American dollar." As in previous books, the author maintains his established reputation as an indefatigable collector of materials bearing on the history of coinage, with the same plea for the rehabilitation of silver by international agreements, and the same eager advocacy of this scheme by arguments of a wholly *ex parte* character. More weight would be given these essays, could the reader be convinced that the author was trying to arrive at truth, rather than trying, lawyer-like, to gain his point by all the means in his power. One must not expect this, however; for he has evidently assumed the mantle of M. Cernuschi. The absolute confidence with which he takes up one monetary problem after another, tosses them lightly in an airy way, settles them decisively and forever, and then curls his lip at those who shake their heads, suggests too often that legerdemain which belongs to the pursuit of one idea.

The reader is constantly asking why — if the complexities of money and prices are after all so simple and so easily explained — there can be any differences of opinion. In the end, he must be convinced that Mr. Horton is so absorbed in his one idea that he gives weight to nothing else, and can see nothing which militates against it. He goes farther even than this. He arrogantly dismisses with a general denial all the elaborate data showing special reasons for the fall in prices of commodities (page 76), and pluckily adheres to the explanation to be found in the scarcity of metallic money due to the demonetization of silver in 1873. As if any informed economist would assert that the level of prices depends solely on the *quantity* of metallic money! Here is the head and front of the author's offending. He makes such statements as this (page 84): "To whatever condition of things the phrase 'contraction of the currency' may be applied, an increase of the supply of gold money must serve as the opposite and negation of it" (*cf.* also page 91); and yet he says (page 89): "Cash payments are but a fraction of the totality of transactions." His general conclusion, however, depends on the fundamental proposition that the world needs more legal metallic money, — else why need he dread the supposed scarcity of gold, or sigh for more silver coinage? No doubt he could use another book to answer this question; but he would thereby repeat a characteristic which frequently appears in these pages. He would spin so fine a cobweb of his argument that it could not be seen.

It would put even Miss Philippa Fawcett to her trumps to see the

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logical *sequitur* between such statements as the following (page 97 and *cf.* page 113):

> Whence comes the strange parity between cheap bronze pennies, light silver shillings, solid gold sovereigns and paper promises to pay five or a hundred or a thousand pounds? Evidently the English lake is well embanked around by English law. If analogous enclosure be given to silver and gold money by the monetary laws of nations, a similar level of parity [*sic*] will be produced and maintained. This can be done by giving two metals equality before the law in a strong body of nations.

The only possible inference from this reference to the bronze, silver and gold coinage of Great Britain (which limits the coinage and legal tender power of bronze and silver money) is that the "strong body of nations" must limit the coinage and restrict the legal tender power of silver.

Although it is necessary to point out such puzzling statements (see also page 46), yet there can be no desire to belittle Mr. Horton's indefatigable industry and zeal. He has made accessible many important documents and papers, especially in the *Report on the Monetary Conference of 1878*. Still one cannot help believing that the work of such ardent bimetallists as Cernuschi and Horton has given support and suggestion to the vagaries of the American "silver man," in whose schemes these gentlemen see the evil as well as any one else, — the misfortune being that few people distinguish between international bimetallism and the theory now rampant in Congress, that we must have more money and hence ought to have silver.

J. LAURENCE LAUGHLIN.

Adam Smith, der Begründer der modernen Nationalökonomie: sein Leben und seine Schriften. Von DR. KARL WALCKER. Berlin, Otto Liebmann, 1890. — 8vo, 50 pp.

Adam Smith und der Eigennutz. Eine Untersuchung über die philosophischen Grundlagen der älteren Nationalökonomie. Von DR. RICHARD ZEYSS. Tübingen, Laupp'sche Buchhandlung, 1889. — 8vo, 121 pp.

So much has already been written about Adam Smith that it seems a pity to tempt the reader with books which profess to say something new, but which in reality only work over again the old material. I regret to say that the two monographs before us fall within this category. The essay of Dr. Walcker concerns itself chiefly with Smith's life. A careful reading fails to disclose in it a single important addition to what has been given by Stewart, Burton, Bagehot, Leser and Haldane on the

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same subject. The only new feature consists in those curious literary characteristics with which all readers of Dr. Walcker's numerous works are acquainted, and which have in part contributed to keeping him a mere *privat docent* for these many years. A great show of bibliographical erudition and a painful lack of broad and sane views are not sufficient to make a valuable book.

The thesis of Dr. Zeyss, on the other hand, is that of a young graduate who tries his hand at the philosophy of the subject. He discusses first Smith's general moral theory, then the idea of self-interest as found in the *Theory of Moral Sentiments*, and finally the theory of self-interest as expounded in the *Wealth of Nations*. Although the author evinces great familiarity with the literature of the subject, and successfully controverts many of the extremists, it cannot be said that he has materially added to the conception or criticism of Knies. The one good point that Zeyss makes is that there is no such chasm as has been generally believed between Smith's two works. Already in the *Theory of Moral Sentiments* the principle of self-interest is expounded, as limited by the ideas of justice; and in the *Wealth of Nations* this same principle is simply applied to the economic sphere. Dr. Zeyss finds fault with Smith's conception as being too optimistic, and as mechanical rather than organic. But the whole discussion will be more interesting to the philosopher than to the economist.

E. R. A. S.

L'Occupation des territoires sans maître. Par CH. SALOMON, docteur en droit. Paris, A. Giard, 1889. — 400 pp.

To the general reader the title of this book will not disclose either the scope or the main purpose of its contents. *L'acquisition des territoires* would more nearly have indicated what the author treats. In the first place, he undertakes to give an account of all the methods by which nations have enlarged their domains, and the assumptions of right or of power upon which they have proceeded. From this point of view, the title is too narrow. In the second place, the larger part of the book is devoted to the discussion of the question whether states commonly called civilized may rightfully seize and occupy territories inhabited by aboriginal peoples. To say that such regions are "*territoire sans maître*" appears to recognize the doctrine which the land-grabbing nations of the earth act upon, but which the author condemns. This, however, is the technical term under which we constantly find the subject treated in French books and periodicals.

The last four hundred years have witnessed various transformations of the theories upon which national cupidity of territorial extension has

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sought to justify itself; but there has been in this time little, if any, abatement in the intensity of the passion. In the days of Columbus, new fields of conquest were sought in the name of religion. Pious princes fostered expeditions of discovery in order that heathen peoples might be brought under the sway of Christianity, and the church in turn graciously allotted the territory so discovered to the princely promoters of the enterprise. The accounts of this devout era show, however, that the incidental discovery of gold and silver deposits was heard with some degree of interest and satisfaction; and, indeed, not all the mineral wealth then contributed by the new world to the old was taken directly from the ground. The heathen parted with their hoarded treasure in its various forms, as well as with their territory and mines. At a later period, the expeditions of discovery were conducted for the avowed purpose of national aggrandizement.

The present age has seen the rise and progress of a new era in territorial acquisition. Less pious than the discoverers of the fourteenth and fifteenth centuries, and less ready to avow their motives than the adventurers of the succeeding period, the territorial acquisitors of the present day invoke the name of "civilization." As the possessors and dispensers of this blessing, they become the custodians of the uncivilized man and the owners of his land. That they disclose a decided commercial bias, and assert their principles in places where gold and silver and precious stones are to be found, is not to be set down against them; for commerce and civilization go hand in hand, though with the former perhaps a little in the lead to point the way. But it cannot be denied that the contribution which civilization exacts from its beneficiaries is often in excess of what it gives them; nor can it be maintained that its methods are always above suspicion. Sometimes it becomes involved in inconsistencies. If, in the exercise of forbearance, it treats with the aboriginal people in the first instance as independent and autonomous, the result is almost invariably the same. It is found that the natives do not observe the treaties; that they exhibit a spirit of obstinacy in clinging to their ancient forms and customs; that they do not regard with as much favor as they ought the efforts to enlighten them. Under these circumstances irritating differences are sure to arise, and the point of exasperation is soon reached. Whether the uncivilized man feels himself goaded to retaliation, or his civilized guardian deems it a duty to punish him for his contumacy, the result of the ensuing conflict is generally the complete triumph of civilization. In such case the new force takes measures to insure its supremacy, and this is generally accomplished by the effective method of annexation.

The present century has witnessed the rapid extinction of independent native communities. In the Pacific Ocean the work has been nearly

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completed, Samoa and Hawaii remaining as almost the last abodes of aboriginal sovereignty. These, it may be said, have been preserved only through the intervention of the United States. All the rest are to-day under the sovereignty of European powers. The same situation is rapidly approaching in Africa.

That the result has been a gain to the material wealth of the world cannot be doubted. Whether, if the methods by which the result has been brought about were faithfully recounted, civilization would have cause for unmingled congratulation, is another question. To the native races, the approach of civilization has frequently meant not only the loss of liberty and property, but also corruption and enfeeblement, if not destruction. Instruction in religion and morality has been more than counteracted by the importation of vice and disease. Firearms and liquor have been staple considerations for the conveyance of land, and the passions of the natives have been fostered for the sake of their despoilment and subjection. Such has been the contribution of civilization to aboriginal peoples, and such is the story of *L'Occupation des territoires sans maître.*

JOHN BASSETT MOORE.

History of the United States during the Administrations of Thomas Jefferson. By HENRY ADAMS. New York, Charles Scribner's Sons, 1889–90. — 4 volumes, 446, 456, 471, 500 pp.

It is rarely that an opportunity is offered for bestowing unlimited praise upon an historical work that covers eight years of a nation's life, crowded with incident, complicated with delicate entanglements of diplomatic relations and colored by partisan and factional temper. For the four volumes of Mr. Adams's history we have nothing but praise, whether we judge it from its style or from its matter. Mr. Adams's experience as college tutor, as editor of the old *North American Review*, as a biographer, and as a close student of American history, has brought him to the task just completed with faculties trained and specialized for performing it well. His style is clear and spirited, — concise almost to a fault, for at times it approaches baldness. His judgment is excellent; the thread of the narrative is never broken; there is no padding with digressions — no striving after effect; and he shows a complete mastery of his subject, — a mastery all the more noticeable from the absence of partisanship.

Jefferson is displayed in these volumes as he has never been displayed before, and yet only such material is used as is furnished by Jefferson himself. This in itself is an achievement of no small difficulty, for few writers — and Jefferson committed everything to paper — were so

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full of contradictions and inconsistency. As Mr. Adams himself says: "Jefferson could be painted only touch by touch, with a fine pencil, and the perfection of the likeness depended upon the shifting and uncertain flicker of its semi-transparent shadows." It is only by following the man almost day by day that a true picture of his character can be drawn, and in this lies what may be called the one weak point in Mr. Adams's work. For Jefferson became President after a schooling in Revolutionary days, under the Confederation and in Washington's cabinet. He assumed power with fully developed political beliefs, intent upon beginning a new political era, and with a following that he had carefully nursed into a party which looked to him as its leader. In the eight years of his presidency he abandoned one by one his most cherished doctrines, sacrificed some of his warmest supporters, produced dissensions in his party, and accepted diplomatic insults and defeats with the calm resignation of an Eastern fatalist. Mr. Adams has described all of this with a master's hand; but it is a matter for regret that he could not also have described with as great minuteness the development of Jefferson's beliefs prior to his election. This is touched upon in certain cases, but the picture is still incomplete.

It would be impossible to notice the many interesting points raised by Mr. Adams, whether of domestic policy or of foreign relations. Jefferson's cabinet was dominated by the influence of Gallatin, who appears as the balance wheel of the administrative machinery. Madison was too much like Jefferson to offer much obstruction to his curious theories; and had the two men been allowed to work their will, unrestrained by the close economy and hard sense of Gallatin, the administration would have become even more conspicuous than it was for its blunders. It did not escape serious accidents. In his first message Jefferson began his career as a Federalist, and the responsibilities of power seem to have postponed indefinitely the political revolution he had promised to inaugurate. At first this wandering from the paths of Republicanism gave occasion to nothing but comment; but as step by step the chosen leader of the people led his following into the Federalist camp, sacrificing his own record to do it, a stout opposition appeared in his own party, headed by John Randolph. Jefferson, however, was too strong for his adversaries. The failure to impeach Chase, the implication in the conspiracy of Burr and Wilkinson, and the stupid blunder of the embargo, were certainly not calculated to inspire confidence in the sober judgment of the President. Yet he could afford to laugh as heartily at the assaults of Randolph as he did at the attempt of the extreme Federalists to divide the Union. It was the success of Gallatin's finance that overshadowed all the failures in domestic policy.

The good fortune of Jefferson in foreign relations again has kindly

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cloaked his shortcomings. The archives of France, England and Spain have supplied Mr. Adams with much new and valuable material, and in describing the course of European diplomacy his admirable style and method are conspicuous. Here are developed the important part that San Domingo played in the safety of the United States, the many and generally selfish vacillations of the French and Spanish courts, seeking to use the emissaries of Jefferson as tools for their own purposes, the coquetting of the powers with one another to keep the United States in suspense and inactivity, and the complete failure of Jefferson's cabinet to meet the exigency with an honest and fearless policy. The ministers and agents of Jefferson were defeated in France, in Spain and in Great Britain; while the ministers of these powers at Washington had many things to complain of, and not the least of them was their inability to understand the President and his Secretary of State. The letters of these representatives are very curious, and the well-known incident of the heelless slippers gives an opportunity for one of the touches of humor that occasionally add zest to Mr. Adams's pages. The author thinks that it would have been better for Madison to notify Merry beforehand that he would not be expected to wear full dress; "in that case the British minister might have complimented Jefferson by himself appearing in slippers without heels."

The crowning success of Jefferson's foreign policy, which served to blind the people to the many defeats it sustained, was the purchase and annexation of Louisiana. This was due rather to the military necessities of Napoleon than to the diplomacy of Jefferson's agents, but the success was none the less brilliant. Nor was the effect upon Jefferson's political creed the less startling.

> Within three years of his inauguration Jefferson bought a foreign colony without its consent and against its will, annexed it to the United States by an act which he said made blank paper of the constitution; and then he who had found his predecessors too monarchical, and the constitution too liberal in powers, — he who had nearly dissolved the bonds of society rather than allow his predecessor to order a dangerous alien out of the country in a time of threatened war, — made himself monarch of the new territory and wielded over it, against its protests, the powers of its old kings. [II. 130.]

The purchase of Louisiana was accomplished when Jefferson was in full tide of popularity. The second term of his presidency can show little but failures of policy. The Burr conspiracy and the commercial hostility of England are the leading features. The one ended in a collapse that barely saved the President from a very embarrassing complication; the other ended in a temporary blunder, but eventually in the war of 1812. The attempt of Jefferson to "entail" his policy on his chosen successor, Madison, was successfully accomplished, but

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at the expense of Monroe, and, indeed, of the country; for the entanglement of our relations with England, due to Jefferson's wish for universal peace, could only be resolved by war. "Peaceable coercion," when employed on such powers as England and France, was the quintessence of impotency, and the means used, the embargo, on which must rest Jefferson's reputation as a "philosophic legislator," only proved this fact. Jefferson retired from office fully conscious that his popularity had been severely injured, and that he had bequeathed to Madison the many perplexities and dangers that his well-meant though mistaken policy had produced. As Randolph said: "Never has there been any administration which went out of office and left the nation in a state so deplorable and calamitous."

In this work we have for the first time a full-length portrait of Jefferson, drawn by a master hand; and it is to be hoped that the welcome given so deservedly to these volumes will induce Mr. Adams to continue the work. It would be difficult to find an American history that can approach it in completeness and in judicial tone.

WORTHINGTON CHAUNCEY FORD.

John Jay. By GEORGE PELLEW. [American Statesmen Series.] Boston, Houghton, Mifflin & Co., 1890. — 12mo, 374 pp.

The first chief justice of the Supreme Court of the United States was born in New York city in 1745, was educated at King's College, was admitted to the bar at the age of twenty-three, and married into the Livingston family in 1774. Immediately after his marriage he entered public life as a member of the committee of fifty chosen by the citizens of New York to consider the means necessary for repelling the British taxation measures of that period. He became the presiding officer of Congress under the Confederation; went upon an unsuccessful mission to the court of Spain; was one of the negotiators of peace at the close of the Revolution, and finally was offered by Washington the choice of appointments in the gift of the President. That he elected to be the head of the federal judiciary is a significant comment upon the new system about to be inaugurated, and must have been, as we look upon it at this distance of time, a favorable augury for the third department of government then first to be established.

Jay was twenty-eight years old when he first accepted public office; for twenty-eight years he served his state and country; and then for a third period of twenty-eight years he remained entirely in private life. To the first and third of these periods the present volume devotes but fifty pages all told, while over three hundred are given up to the acts

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of the statesman period. This allotment of space was perhaps inevitable, but it is to be regretted that its spirit pervades the entire work. The man Jay is kept quite too far in the background, while his acts as an officer or judge or diplomatist are set forth much after the style of a chronicle; so that Mr. Pellew seems not to have been able — perhaps he has not attempted — to make graphic or interesting the scenes in which Jay took part. His hero is an automaton, moving through a certain course with a mechanical exactness that excites astonishment at the unknown genius which controls the mechanism. Yet Jay was, we know, one of the most human of beings. In his letters to his wife (we wish for fuller extracts), in his correspondence while minister abroad, of which we have here but the skeleton, in his treatment of his slaves, here dismissed in half a paragraph, we see the living, feeling man, in spite of the unconscious skill with which this being is here concealed in the cold, clear, calculating statesman.

As a biography, then, this work unwittingly does injustice to its subject. As a history it is deserving of more consideration; for its author has unquestionably shown diligence in his researches, and has made use of some sources not before accessible, while not neglecting the standard works. Yet it is not the whole of writing history to state facts; and it is just on this point that this work is disappointing. The number of facts given in its pages is totally out of proportion to the amount of setting given to those facts. No fact legitimately forms part of a written history unless correlated with a cause or an effect or both. That the court met and adjourned for lack of a quorum, or that the post-horses were engaged for the Comte du Nord (with whose acquaintance we are otherwise not honored) — this is not history.

"Local color" is a much-abused element in modern writing, but its desirability is only too strongly shown in this volume. Jay spends over two years in Spain, yet no account is given of the nature of the court from which he sought recognition; he is elected president of Congress when but three days a member, but scarcely a hint is given of the reasons for so astonishing a selection. A similar mistake is the introduction of the names (not quite the personalities) of men not to-day known to the average reader, without a word to explain their positions or characters or even their nationality. Thus Marbois, Vergennes, Luzerne and Gérard are spoken of with the same easy familiarity that we are accustomed to use in mentioning Washington, Jefferson, Hamilton or Jay. To the reader not already acquainted with the history of the diplomacy of the Revolution this must be confusing in the extreme.

Nevertheless, Mr. Pellew has gathered, in convenient and accessible form, much of the history of the times of Jay, and has given a succinct account of so much of our formative period as Jay took part in, and

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this was not a little. Especially valuable are the chapters upon the peace negotiations; while this anecdote, preserved by family tradition, is a useful commentary on some notions now current as to the "forefathers": "'Jay,' said Gouverneur Morris some thirty years afterward —'Jay,' he ejaculated, 'what a set of d——d scoundrels we had in that second Congress!' 'Yes,' said Jay, 'that we had'; and he knocked the ashes from his pipe."

HENRY HARMON NEILL.

De l'organisation des Conseils Généraux. Par GEORGES DETHAN. Paris, A. Giard, 1889. — 331 pp.

This work is somewhat disappointing. As its title indicates, it is devoted to the organization of the general councils of the French departments. Nothing whatever is said, however, about the functions of these bodies. It is not therefore by any means a complete discussion of this, one of the most important of French local authorities. But perhaps it is ungracious to criticize a book for not being what it does not pretend to be or what its author never intended to make it. Dr. Dethan purposed merely to give a thorough and detailed description of the organization of the general council, and this he has done. The first part of the work is devoted to the "General Councils before 1871," the date of the law governing them at the present time. This is followed by a discussion of the law of 1871, the reasons for its passage, and an outline of the important changes made by it. The other chapters of the work are given up to a detailed description of the organization of the present general councils and their permanent committees, the departmental commissions, with quite full references to the decisions of the council of state and the department of the Interior relative to the workings of the present law.

The most interesting part of the work is the introductory portion, treating of the attempt made under the *ancien régime* to form local legislative and administrative bodies in the provinces. In these assemblies, whose formation was due to Necker, are to be found the germs of the present general councils. Not only, however, are the general councils to be traced back to the provincial assemblies of Necker, but the departmental commissions also, founded finally almost a century after Necker lived, are derived from one of the features of his plan, *viz.* the *commission intermédiaire.*

Another interesting portion of the book is that devoted to the analysis of the various plans presented to the National Assembly of 1871. Whatever differences may have existed between these plans, they all were permeated by the same idea, *viz.* decentralization. So great was the demand of all for more local freedom than was granted by the institu-

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tions of the second empire, that the committee to which these plans were submitted was called the *commission de décentralisation*. At the same time, however, the men who guided the reform were quite conservative in spirit. The result, therefore, was simply farther progress in the way marked out by the second empire in the law of 1866. The only important departure from that general plan was the formation of the departmental commission — a permanent representative of the general council — which was to exercise a local control over the agent of the central government in the department, *viz.* the prefect. The whole progress of this movement and the details of the various reform plans are given by Dr. Dethan with just sufficient detail to keep this part of the work interesting to the general reader while making it profitable as well to the student. The latter part of the work, though not so interesting, on account of the greater detail which the conditions of the task have made necessary, is still most valuable to any one desiring to know all that is to be known about the general councils. But nothing beyond the information in regard to their organization must be expected.

F. J. G.

Des Hautes Cours Politiques en France et à l'étranger. Par Adolphe-Émile Lair. Paris, Ernest Thorin, 1889. — xxiv, 436 pp.

There are in France so many political parties with radically different views as to the kind of government best for the country — parties which feel little hesitation in attempting to make the changes they regard as advisable — that the question of the best method of punishing what are called *attentats contre la sureté de l'État* is a serious one. The question is one which every government existing during this century has had to consider. The turbulent character of the people at the time of the French revolution made it seem advisable to form a special tribunal for the punishment of all such attempts. Each of the governments which have succeeded one another with such rapidity since 1789 has endeavored to solve this problem in its own way, and most of the solutions arrived at have agreed in this one particular, that the political crime of attempting to overthrow the existing government should be excluded from the jurisdiction of the ordinary courts. How the special court which this way of solving the question made necessary should be formed, seemed so important a question to the Paris faculty of law, that they provided in 1884 that the subject of the Rossi prize should be *Des Hautes Cours Politiques dans les temps modernes*. M. Adolphe-Émile Lair, formerly a justice of the court of appeal at Angers, was the successful competitor for the prize, his dissertation being crowned by the faculty of law. This dissertation is the basis of the book before us.

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M. Lair has profited by the criticisms and suggestions made at the time the prize was awarded to him and has also enlarged considerably the compass of his original dissertation, treating in his book of the *hautes cours politiques* not only in modern but also in earlier times so far as to include a description of the institutions of ancient Rome and of Europe in the middle ages. His discussion of the courts in France for the trial of treason and similar political offences is from both the historical and the legal point of view remarkably thorough — so thorough as to become, in the case of the revolutionary governments between 1789 and 1815, somewhat tedious to the foreign reader. What is of particular interest, however, is the admirable work which has been done in bringing together the institutions of all important modern countries. Here again the author has been lured by an overweening desire for thoroughness into the pit into which so many students of comparative institutions fall. It is doubtful whether the institutions of the Orange Free State or of Iceland offer an example which can be copied with advantage by any of the great states of the present day. In this portion of the work the author seems to have relied more than is advisable upon secondary sources of information, — a failing which can be excused only by the well-known lack in France of the original materials for the study of foreign institutions. One result is incompleteness of treatment in many instances; for example, in the portion of the work devoted to the law of the United States. Almost all the author seems to know of our method of trying treason or of impeaching officers is derived from a study of the constitution and from the reading of one or two French histories of this country. His knowledge of our various state trials is scanty; the only one he alludes to is the impeachment of General Belknap, such an important trial as that of President Johnson not even being mentioned.

The general principles, however, which M. Lair derives from his work on the institutions of foreign countries are valuable. He finds that in the organization of the tribunal for the trial of political crimes three systems have been adopted. In the first the jurisdiction belongs to the legislature; in the second, to the highest ordinary court in the land; in the third, to a special court constituted to assume it. In a few states, finally, a mixed system is found. From the point of view of the punishment which is meted out, two classes may be distinguished, according as conviction is followed simply by removal from and future disqualification for office, or by some further criminal penalty. The author is convinced, it would seem, from the special study which he has made of this subject, that the formation of a special court is necessary largely because of the inability of the ordinary courts, in times of great political excitement, to suppress political conspiracies and to

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convict offenders in high station. But at the same time that he demands the formation of a special court for the trial of political offences, he insists that the court shall be so formed as to be as far as possible free from political influences, and that its jurisdiction shall be exactly defined by law, so as to leave little or no discretion in applying the penalties.

While M. Lair devotes the larger part of his work to the discussion of the punishment of political crimes, he treats also of the impeachment of state officers for misdemeanors other than political, *i.e.* of the final control which the legislature may exercise over the executive. The attempt to treat two somewhat different subjects at the same time is often confusing. Thus the author's criticism of the system in vogue in the United States is really unfounded, because our method of impeachment is designed to give the legislature a control over the executive rather than to provide a means for the punishment of political crimes. Political crimes are included in the ordinary criminal law, and are punished by the ordinary courts, with the single exception of those committed by officers of state. This fact seems to be overlooked by M. Lair. Like so many French books, this volume is not provided with any index, and is on that account less acceptable as a book of reference.

F. J. G.

Twelve English Statesmen: William the Conqueror. By EDWARD A. FREEMAN. 200 pp. — *Henry the Second.* By Mrs. J. R. GREEN. 224 pp. — *Henry the Seventh.* By JAMES GAIRDNER. 219 pp. London and New York, Macmillan & Co., 1888–1889.

We are living in an age of series. History, art, science, literature and religion are set before the public in an endless array of monograph-groups. Whatever the disadvantages of the fashion, it has a distinct æsthetic significance. The dainty series is to the ponderous fourteen volume history as a French cook's masterpiece to a Virginia barbecue. There may be more nourishment in the latter, but an appreciation of the former denotes the more refined palate.

Judged by the three volumes before us, *Twelve English Statesmen* is destined to rank with the best of recent series. Each monograph is a triumph of biographical art, won without sacrifice of scientific value. In each case are displayed the characteristics of the man that entitle him to the rank of a statesman, without disregarding the characteristics of the times which made the statesman possible. That each of the authors is an expert on the history of the period to which his subject belongs is important; but this alone will not account for the excellence of the little

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works. There is evidence of an artistic literary sense which has guided the historian's pen. Mr. Freeman's ideas of William the Conqueror are too familiar to need comment. They are put here in the author's best style. Mrs. Green's treatment of Henry II does full justice to that high-tempered, hard-headed and industrious monarch. She is as thoroughly convinced of his importance to English history as Mr. Freeman is of William's. Witness two rather conflicting statements, by Mr. Freeman (page 2) and Mrs. Green (page 1) respectively:

> That the history of England for the last eight hundred years has been what it has been has largely come of the personal character of a single man [William, of course].
>
> The history [of the English people] as we know it and the mode of government which has actually grown up among us is in fact due to the genius of the great king by whose will England was guided from 1154 to 1189.

Mr. Gairdner's characterization of the first Tudor sovereign is rather more favorable to Henry's personal attractiveness than that generally current. This monograph, like Mrs. Green's, derives a delicious flavor from the quaint sayings of the old chroniclers with which it is occasionally embellished.

Excellent paper and print give an additional charm to what must be pronounced so far a delightful and valuable series.

W. A. D.

La vérité sur l'expédition du Mexique, d'après les documents inédits de ERNEST LOUET, payeur en chef du corps expéditionnaire: *Rêve d'Empire*. Troisième édition. 12mo, vii, 338 pp. — *L'Empire de Maximilien*. Troisième édition. 339 pp. Par PAUL GAULOT. Paris, Paul Ollendorff, 1889–1890.

The story has often been told of the astounding scheme of Napoleon III to establish a foreign prince upon the throne of Mexico, and by means of French arms and diplomacy to turn the tide of civilization and commerce in favor of the Latin races and to the particular advantage of the Emperor of the French. Comte de Kératry, who served in Mexico under Bazaine and resigned, in 1865, when he saw the true character of the expedition, shortly afterwards wrote a series of articles for the *Revue contemporaine* which attracted great attention on account of his disclosures and the scope of his views. These articles were put in book form in 1867. The following year Clément Duvernois published a volume called *L'Intervention Française au Mexique*, which in fact was but little more than a well-edited text of the most important documents then known in connection with the expedition. The first

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thoroughly historical treatment of the subject was given in two octavo volumes, published in 1869, called *Historia de la Intervencion Francesa*, by E. Lefèvre, editor of the *Tribune de Méjico*. Lefèvre covered the whole period of Mexican independence and brought plainly into view the traits of the factions whose violent contentions ultimately became the occasion of intervention. He was also the first to use extensively the archives which were left by Maximilian. Although manifesting the influence of contemporary feeling, his volumes investigated the whole field so well that but few mysteries remained in it.

The volumes which are the subject of this notice appear under peculiar circumstances. Ernest Louet, who was in Mexico as paymaster to the *corps expéditionnaire*, conceived the idea of writing a complete history of the intervention on the basis of all the facts which could be gathered from the known official and private documents and from all the obtainable private correspondence of those who were prominent in the movement. His exhaustive search was rewarded by the discovery of many confidential letters of Napoleon III, of his Minister of War, Randon, of the Emperor Maximilian, and of others. Thus he was the first to hear all the evidence in the great case in diplomacy. Unfortunately Louet died before the literary part of his task was completed. Paul Gaulot has undertaken to finish the work. Under these circumstances it would not be fair to hold either of the writers responsible for the final product, or even for any particular part of it; for there is nothing to indicate where the work of the one ended and that of the other began.

The main justification for the publication in its present form is that it contains a number of important documents which otherwise might long remain unknown to students of this period. This new material, however, makes no very startling revelations; its chief value consists in the corroboration it affords to some of the most damaging inferences of Napoleon's keenest contemporary critics. As is well known, Napoleon continued to reiterate to the United States, throughout the entire period of intervention, that he had no desire to interfere with the people of Mexico in the formation of a government. Of course no one believed that he was sincere. Here we are furnished with copies of his confidential correspondence in which he gives his military and diplomatic representatives specific instructions as to how to proceed to form a government in order to satisfy certain purposes of his own. A single sentence from a letter of September 12, 1863, to General Bazaine is only one of many similar cases: "Quoi-qu'il y ait un gouvernement provisoire, mesure indispensable (afin d'éloigner la pensée que je voulais garder le Mexique), le général français a le devoir de tant empêcher ou de tant decider par son influence." (*Rêve d'Empire*, page 168.) In fact

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nothing was left to the decision of the Mexican people, and even Maximilian constantly remained a creature of Napoleon's shifting plans.

Maximilian is treated in these volumes in a very philosophical spirit; so that although his weaknesses are apparent, one cannot but sympathize with his fine sentiments and with the high purposes of his reign. Except in the first part of the earlier volume, the character of Napoleon has not been painted in colors that are sufficiently strong and positive. The reactionary and impractical struggles of the Clerical party, vigorously assisted by the Pope, are described with fulness and perspicacity. Unfortunately the authors seem to have given no special study to the diplomatic relations which France had with both the United States and the Confederate States in connection with the occupation of Mexico. As a third volume, *Fin d'Empire*, is promised, it is to be hoped that these relations — which were of the first importance to the diplomacy and to the ultimate success or failure of Napoleon's scheme — will not be left to the few pages of general description given in the volumes already published.

FREDERIC BANCROFT.

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